IN THE

Supreme Court of the United States

No. 779. In Equity

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Appellant,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION, BAILEY P. WOOTTON, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY, CITY OF LEXINGTON, A MUNICIPAL CORPORATION, S. B. FEATHERSTON, INDIVIDUALLY AND AS REPRESENTING ALL OTHER PERSONS SIMILARLY SITUATED,
Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky

BRIEF FOR THE APPELLEES

ROBERT H. WINN, *Mt. Sterling, Ky.,*
C. M. HARBISON, *Frankfort, Ky.;*
BAILEY P. WOOTTON, *Frankfort, Ky.,*
S. H. BROWN, *Frankfort, Ky.,*
Attorneys for Appellees

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Where a due process commission, duly empowered thereunto by the state, has, through an orderly hearing, fixed a public utility rate, no court is at liberty to substitute its own conclusions for those of the commission, unless and until the court, inspecting the commission record, first is convinced that the commission's fixation rested, not upon testimony or reason, but upon an arbitrary or capricious fiat 1–15

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Appellees.

BRIEF FOR THE APPELLEES

The appellees in the preparation of this, their brief, will, in compliance with the court's rule, make no historical nor fundamental statement of the facts in the record. They will content themselves with manifesting

to the court certain errors of statements (as they conceive them to be) in the brief for the appellant, as they, and the deductions flowing from them, may come up for discussion.

Enough will have been gathered from the brief for the appellant to make apparent what is here. As the minds of the court will have caught from that paper, there are certain elemental differences between the positions of the parties which are apparent enough, but which perhaps had best be concretely set forth here. The major differences are these:

First. The date of the natural gas franchise contract between the City of Lexington and the Gas Company is January 28, 1927. Both sides addressed their main proof to December 31, 1926. The three-judge court adopted this date of December 31, 1926, as the date for its decision. The brief of the appellant contends that the court should have taken that date to ascertain values, but should have taken a date of near a year later, when certain high priced gas bought by the appellant had first come into the picture, for the ascertainment of operating expenses, revenue, return, and the like. The trial court and the appellant are at sharp divergence. Here are their respective statements:

(a) The court says in its opinion (Record, p. 85) that "we are asked to fix the rate base and determine the income as of December 31, 1926." Then, on July 29, 1932, the court, in an order (Record, p. 90) overruling a petition for modification of the opinion, said this:

> "Upon the hearing of this cause the parties requested the court to fix the base value of plaintiff's property allocable to Lexington as of De-

> cember 31, 1926, and determine whether the rate established by the Commission aforesaid is a reasonable rate on such values as of said date. The court having acted upon such requests and made its findings and determinations as of said date * * * it is ordered that the petition for modification and amendment of the opinion be denied."

(b) In its brief here the Gas Company makes categorical denial of what the trial court said. It said (and there could not be a much more direct contradiction of the recital of the three disinterested judges) this:

> "The court was never requested at any time by any of the parties to determine the validity of the Commission rate as of December 31, 1926, and there is absolutely nothing in the record to support such statement."

We will revert later in this discussion to this diametric conflict.

Second. The appellant would have it that the appellees are not to be permitted to reach the trial court's conclusion through a route of reason other than that followed by the trial court. The trial court's decree left in effect the 45-cent rate of the Railroad Commission; and it is thought by the appellees that they have the right to reach that rate through reasoning processes, and the adoption of figures, other than those employed by the court, and to differ with certain theories, or conclusions, if you will, adopted by the trial court. And since this is one of the major points stressed in the appellant's brief, and since much of the discussion in this paper for the appellees turns upon the right of the appellees to reach the court's result through their own processes of reasoning, we develop now the authority

upon the subject—contenting ourselves with what this court has written in three of its later cases:

Langnes vs. Green, 282 U. S. 531, s. c. 75 L. Ed. 520. Here the court said:

> "But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

United States vs. American Railway Express Company, 265 U. S. 425, s. c. 68 L. Ed. 1087, thus puts it:

> "The Southeastern insists that these claims, although adequately presented in the bill of complaint, cannot be availed of in this court, because they were overruled by the District Court and the American did not take a cross appeal. The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it."

In *United Railway and Electric Co. vs. West et al.,* 280 U. S. 234, s. c. 74 L. Ed. 390, quoted *post* herein, the court said that a matter contested throughout and a

necessary element in the ascertainment of a fair rate, might be considered on the appeal at the instance of the appellee without cross appeal or *certiorari*.

The philosophy of these cases is sound, it is submitted. It is not that an appellee may, without cross appeal, reach any result other than that of the decree. *Per contra*, it is that the appellee may reach the *same* result as that fixed in the decree, though he may reach that result by different mathematics, a different process of reasoning, or a different application of the subjects discussed by the court. In so doing the appellee argues not in opposition to the decree, but in support of it.. The principle is as old as jurisprudence itself, that the decree of a trial court will be affirmed if it be right, notwithstanding that the reasoning of the trial court in reaching the decree be wrong. The trial court's decree here declined to enjoin the 45-cent rate emanating from the Railroad Commission. The trial court declined to enjoin it for certain reasons assigned in the opinion. What we do under the authority of these cases, and under their privilege, is to argue that the court could do no less than to leave effective the 45-cent rate for reasons other than those employed by the trial court. The purpose of an appeal, of course, is to alter, or set aside, the effect of a decree or judgment. A decree imputes finality. It is to be altered only by an appeal. That is what the appellant endeavors to do here, to secure through the channel of this appeal a different result from that reached by the trial court. So if the appellees sought to reach here a different result, *i. e.*, to change the 45-cent rate left in effect by the decree, if they wished to make that rate lesser, they would need to take out their cross

appeal; but they do not conceive it that any appeal is necessary to *sustain* the decree; and they do conceive it that within the dictates of fair reason, and within the declaration of the authorities, *supra*, they may stand behind the decree, fortified by ramparts other than those erected by the trial court. This principle will run through much of appellees' discussion. So, out of sequence, and before any effort at orderly presentation by the appellees of their side of the controversy, they have thought well to develop this underlying element in the work in this paper.

Third. The trial court found a 7 per cent rate of return to be fair; and of this the Gas Company complains. There will be certain, not extended, discussion of this matter as well in this paper.

In addition to these matters of controversy as propounded by the appellant, the appellees think that there are other subjects for consideration in the record, favorable to their side, which will be discussed in due order, and which are set forth in the index preceding this paper.

This, a public utility rate case, is to determine whether a natural gas rate fixed by Kentucky's authorized body, the Railroad Commission, for the sale of gas at Lexington, Kentucky, is "confiscatory." In passing, it is to be reflected that that much employed and most misleading word has no place in the Constitution; and unless "to confiscate" be limited in its intent as coequal with "to take without due process of law" it should be eliminated from the rate case vocabulary. And the terms are not synonymous. The fundamental intent of

"confiscate," as defined by the lexicographers, is a *seizure* of property, and its application to a public use. That concept of a seizure has a sinister and disagreeable intent. To hear the word invites a sort of spiritual hostility. The prohibition of the Constitution has no such instinctive animus against the exercise of fair reason. It, in fairer words, says that property shall not be taken without due process of law. It was not a guileless lawyer who first brought "confiscate" into the vernacular of these cases; for he brought in an idea, unpalatable to our mental impulses, that the makers of the Constitution did not put there. But the use of the word here happily serves to clarify and accentuate this opening point for the appellees:

I.

Where it appears from the record that there has been a *hearing* in some agency of the state, either in a rate-deciding commission or in a duly constituted court, the federal court may not and will not interfere against the state fixation or decree unless it be made to appear that the state tribunal's decision was the result, not of deliberation and decision, but of passion or prejudice; or was withal so unsupported by any evidence as to manifest that the decision was wholly arbitrary. The court will not weigh and consider the record from the state tribunal to ascertain whether the latter reached a sound conclusion; nor will it weigh the evidence to determine whether it preponderates for or against the conclusion arrived at; for to do so would be an arbitrary substitution of a federal court's conclusion for that of a state

tribunal, reached upon the exercise of its duly delegated statutory functions. The federal court will be restricted, therefore, to an investigation of the record only so far as to ascertain, not whether it agrees with the state tribunal's due-process decision, not whether its due-process decision was right or wrong, but whether its conclusion was so arbitrary, so capricious, as to convince the mind that it was arrived at without evidence to support it. The rule is the same whether federal jurisdiction be invoked directly, as here, or on appeal from a decision of a state court.

Now let us again state this, for we desire to be clear, to make ourselves clear. The bill filed by the appellant in the three-judge court sets up the constitutional and statutory creation of the Railroad Commission (Record, p. 2); and how appellant agreed in its franchise contract that it and the City of Lexington should take their rates to the Railroad Commission for fixation, under the pertinent sections, 201e-1 to 201e-20 of the Kentucky Statutes (Record, p. 4); and how the matter of the rate "was duly heard by said railroad commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainant and this company, and said case was submitted on the pleadings, proof and exhibits" (Record, p. 5). So, from the bill we have it that there was a rate fixation, under orderly statutory processes, by a duly constituted body, which received pleadings, heard evidence and decided. Under these conditions we submit it that the primary limit of the federal court's inquiry is, not whether the Commission's rate was right, nor whether the rate, eventuating from the Commission's trial was that rate which might

have eventuated from an original admeasurement by the court, but whether, and solely whether, the Commission's decision was so meretricious, so arbitrary, and so unreasonable, as to permit the court wholly to disregard it, and to substitute its own rate concepts for those of the Commission. And it is from that viewpoint, it is respectfully submitted, that the court must approach this case. We rest upon the following authority:

Louisville & Nashville Railroad Co. vs. Kentucky, 183 U. S. 503, s. c. 46 L. Ed. 298, a case dealing with rate fixation by that same Kentucky Railroad Commission complained of here. The position of the railroad was that the question of the reasonableness of a rate was eminently a question for judicial investigation, and that if the rate be fixed in the absence of investigation by judicial machinery, there was *ex necessitu* a violation of the prohibition against taking without due process. This court denied this contention, saying:

> "And accordingly, if it appeared in the present case that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the federal courts to interfere with the legislative department of the state government when acting within the scope of its admitted powers is always the exercise of a delicate power —one that should not be resorted to unless the reason for doing so is clear and unmistakable."

Louisville & Nashville Railroad Company vs. Garrett et al., as The Railroad Commission of Kentucky, 231 U. S. 298, s. c. 58 L. Ed. 229. This court, in passing upon the matter, remarked that "the Commission set the matter for hearing; that the parties were heard; that each party produced a number of witnesses, and that the appellant, represented by counsel, was permitted to cross examine the witnesses." The court then decided that "courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment, with respect to the reasonableness of rates, for that of the legislature or of the Railroad Commission exercising its delegated power." Then the court further proceeded to make this clear and conclusive statement:

> "It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence and arguments submitted and a determination by the Commission whether the existing rates were excessive. But, on these conditions being fulfilled, the questions of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be re-examined by the court."

The Kentucky court of last resort in *Southern Ry. in Ky. vs. Frankfort Distillery Co.,* 233 Ky. 771, 777, quotes, just as we have quoted, from the foregoing *L. & N. vs. Garrett* case and upholds a proceeding before the Commission as a due process hearing.

Kansas City S. R. Co. vs. United States, 231 U. S. 423, s. c. 58 L. Ed. 296. Here the court tersely said of

an effort to attack in the courts a finding of the Interstate Commerce Commission upon due hearing this:

> "So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review."

Railroad Commission vs. Cumberland Telephone & Telegraph Co., 212 U. S. 414, s. c. 53 L. Ed. 577. The court below was of opinion that the telephone rates fixed by the Railroad Commission of Louisiana were fixed "by mere arbitrary conjecture by the Commission, not based on investigation or the exercise of judgment and discretion," and the lower court therefore enjoined the rates. The decree was reversed by the Supreme Court. It said:

> "Now it may be true that these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that, upon the investigation, the Commission may have come to a mistaken conclusion by reason of erroneous influences from the evidence furnished by complainant's own returns, but that is far from showing that the Commission had, by a merely arbitrary order, promulgated certain rates without making the slightest effort to obtain any knowledge whatever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and, as a result, the rates adopted were not merely arbitrary conjectures, but based on reasons which, while they may have been insufficient, cannot be described as resulting in a decision wholly without evidence to support it."

Interstate Commerce Commission vs. Union Pacific Railroad Co., 222 U. S. 541, s. c. 56 L. Ed. 308. In this case the District Court for the District of Minnesota had enjoined certain tariffs promulgated by the Interstate Commerce Commission. The Commission answered, and set up the fact of a full hearing. The District Court was reversed, and the Supreme Court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience' (*Illinois C. R. Co. vs. Interstate Commerce Commission*, 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. Rep. 700). Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Washington ex rel. Oregon R. & N. Co. vs. Fairchild et al., Railroad Commissioners of the State of Washington, 224 U. S. 510, s. c. 56 L. Ed. 863. Here there was a hearing by the Oregon Commission as to the necessity for certain additional trackage. The matter for decision went up to the highest court of Washington, which dismissed the bill. It then proceeded to this court. The Supreme Court remarked that the carrier had had its full hearing, and then this:

> "If, then, the defendant had notice and was given the right to show that the order asked for, if granted, would be unreasonable, it has not, in this case, been deprived of the right to a hearing. That being so, it leaves for consideration the contention that, as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony, or of deciding upon pure questions of fact, but, as said in *Kansas City Southern R. Co. vs. C. H. Albers Commission Co.*, 223 U. S. 591, *ante* 565, 32 Sup. Ct. Rep. 320, from an inspection of the 'entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.'"

Interstate Commerce Commission vs. Illinois Central R. Co., 215 U. S. 452, s. c. 54 L. Ed. 280. The matter up there for consideration was a certain car distribution order made by the Commission. The court, in denying the right of a judicial review, and in meeting the arguments made by the carrier, said:

> "Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specifically refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

People ex rel. New York & Q. Gas Co. vs. McCall, 245 U. S. 345, s. c. 62 L. Ed. 337. This case involved an order of the New York Public Service Commission about certain gas service. Its position is best set out in the second syllabus, thus:

> "While the Federal Supreme Court has no authority on writ of error to a state court to substitute its judgment for that of an administrative body, such as a state Public Service Commission, as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, it will enter upon such an examination of the record as may be necessary to determine whether there was such a want of hearing, or such arbitrary or capricious action on the part of the Commission, as to deny the invoked constitutional right to due process of law."

Then, in concluding its opinion, the Supreme Court expressed its conception of judicial power with respect to due process rate-hearings before public commissions, thus:

> "We agree with the Court of Appeals of New York in concluding that the action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore that, even if the courts differed with the Commission as to the expediency of the order, they are without authority to substitute for its judgment their views of what may be reasonable and wise."

Interstate Commerce Commission vs. L. & N. R. Co., 227 U. S. 88, s. c. 57 L. Ed. 431. Here Mr. Justice Lamar wrote for the court that rate orders "*quasi*

judicial in character" were void "if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence'." Then the opinion concluded:

> "The order of the Commission * * * was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict, nor put their judgments against that of the rate-making body."

Is not the foregoing exposition of the attitude of the federal courts in exact accord with the common sense of the matter? It seems to us that it is, and this for the reason that there is nothing in the Fourteenth Amendment to require as due process the application of the energies and the independent deciding processes of two distinct bodies, the one as fully clothed as the other to hold sittings, to hear evidence, receive pleadings, hear arguments and to render decisions. And, upon the other hand, it is, of course, open to the federal courts always to inquire whether there has been a hearing that is in fact a hearing, as upon the one side, as against, upon the other side, a pseudo-hearing, resulting in a decision so arbitrary as in fact to constitute no hearing. And in the latter case the federal court may act, while in the former it may not. That, we submit, is the limit of the right, the "jurisdiction," if you will, of the federal or other courts to scan and consider rate fixations emanating from the Kentucky State Railroad Commission. There seems to rest in the minds of the lawyers and suitors who have had to do with many Kentucky litigations a singular inability to consider, or an obstinate unwillingness to con-

sider, how the hearing conducted before the Kentucky commission itself affords "due process." Let us see:

II.

A hearing under Section 201e-1, and following, of the Kentucky statutes, is a due-process hearing. It is not essential that due process be exercised, be available, alone in some one or another court proceeding. Boards and bodies set up by paramount law and empowered by such law to decide upon due investigation, and upon due opportunity to the interested parties, for hearing, are just as much the vehicles of due process as are the duly constituted courts of the land. The principle has been recognized repeatedly. Perhaps the best and most succinct statement of it is to be found in *People vs. Apfelbaum,* 251 Ill. 18, s. c. 95 N. E. 995, thus:

> "Due process of law does not necessarily imply judicial proceedings. Orderly proceedings according to established rules which do not violate fundamental right must be observed, but there is no vested right in any particular remedy or form of proceeding. A general law, administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process."

The Illinois writer cites as sustaining this proposition (and they do sustain it) these cases:

Den vs. Hoboken Land Company, 18 How. 272, s. c. 15 L. Ed. 372;

Kelly vs. Pittsburgh, 104 U. S. 78, s. c. 26 L. Ed. 658;

Ex parte Wall, 107 U. S. 265, s. c. 27 L. Ed. 552.

To these we add:

Reetz vs. Michigan, 188 U. S. 505, s. c. 47 L. Ed. 563. In this case the question was whether a hearing held by the Medical Board of Registry upon the eligibility of one desiring to practice medicine was due process of law. The Supreme Court held that the hearing did afford due process, and this without more.

Hurtado vs. California, 110 U. S. 516, s. c. 28 L. Ed. 232. In this case it was said:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Palmer vs. McMahon, 133 U. S. 660, s. c. 33 L. Ed. 772. Here the court succinctly put it:

> "The phrase 'due process of law' does not necessarily mean a judicial proceeding."

Now, as within these general principles, let us turn to the Kentucky statutes, Section 201e-1, *et seq.,* under which the 45-cent rate complained of was arrived at, and particularly let us consider Section 201e-14, wherein it is provided that when a natural gas complaint is made,

> "said Commission shall give the company complained of not less than ten days' notice * * * of the time and place of the hearing of same, also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company is or has been guilty of extortion said Commission shall make and fix a just and reasonable rate."

That assuredly provides for a full hearing. Then we may very well ascertain from the bill itself whether the company had such hearing, such a due-process hearing. We find at Record page 5 of it this:

> "Plaintiff says that said complaint was duly heard by said Railroad Commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainants (City of Lexington, etc.) and this Company, and said case was submitted on the pleadings, proof and exhibits introduced by the parties thereto * * * and written briefs thereafter filed by the respective parties."

These proceedings were before a public commission, created by Kentucky's Constitution, and duly empowered by its statute law. Why was not this hearing one of due process?

Next the court is asked to turn to Section 820a-1 of the Kentucky Statutes, wherein provision is made for hearings by this same commission over railroad rates in precisely the same words; the very same words, as those just quoted, *supra,* from Section 201e-14 as providing for hearings on natural gas rates. As well, Section 829 of the Kentucky statutes provides for hearings before the Railroad Commission, in words not the same, but in intent the same, covering the same subject matter of railroad rates. With these statutes in mind, with their intent impossible to be differentiated from the gas hearings statute, let us consider whether these hearings afford "due process" as within the attitude of the Supreme Court upon the subject. It came up for consideration in *Louisville and Nashville Railroad Company vs. Finn and others, constituting the Railroad Commis-*

sion of Kentucky, 235 U. S. 601, s. c. 59 L. Ed. 379. It was urged as against the act of the Railroad Commission that, "because in the proceeding before the Commission there is no formal issue, and no method of requiring the production of evidence" there was wanting due process of law. The court answered this, denying the contention, thus:

> "We have already seen that there was evidence to support the Commission's affirmative finding upon the latter point. And this leaves no basis, as we think, for appellant's present attack upon Section 829 *as repugnant to the due process provision of the 14th Amendment.* In the proceeding before the Commission there were pleadings sufficiently formal, and appellant was permitted to raise such issues and introduce such evidence as it desired."

There the attack was made upon a hearing before this same commission upon the ground that the hearing did not afford due process; and this court, saying that there had been evidence to support the commission, said that there was "no basis" for the contention. The bill in the instant case affirmatively sets up the amplitude of the hearing on these gas rates upon pleadings and evidence and argument. And if in that Kentucky case a hearing before the Kentucky Railroad Commission afforded due process as within this court's view, it is respectfully submitted that the Gas Company had its due process in the hearing which it pleads that it had before this same commission.

Whether a rate made upon a hearing before the Railroad Commission, under these same statutes, was a rate made, with a consequent taking of property under

it, without due process of law, was presented and answered by this court in *Louisville and Nashville Railroad Company vs. Kentucky,* 183 U. S. 503, s. c. 46 L. Ed. 298. The contention was directly presented, had the court's equally direct attention, and met a denial from the court in these words:

> The railroad contends "that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States."

The court answered this contention, and as well the further one pressed in this brief that the courts are limited to the question of arbitrary action, thus:

> "We are not prepared to accept the view that the Railroad Commission, in acting under Sec. 218, is merely an administrative body, and as such, subject to judicial review. It is rather a constitutional tribunal, empowered, upon the application of the carrier, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the Commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition. If he elects

> to resort to the Commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the law provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them, whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud, or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void."

Let it be remembered that the Gas Company, too, took the subject of its rates to this same Commission by its own express agreement. (See Section 4B of the franchise, Record, page 32.)

Again, in *Louisville and Nashville Railroad Company vs. Garrett and others, as the Railroad Commission of Kentucky,* 231 U. S. 298, s. c. 58 L. Ed. 229, this same Commission and its control over rates, and the question whether its hearing processes constituted due process, came up for consideration; and as well the further contention that the absence from the Kentucky Railroad Commission statute of any direct provision for an appeal to the courts, invalidated it as wanting in due process. And the court said:

> "Undoubtedly, a state may permit appeals to its courts from the rate-making orders of its railroad commission, and, upon the review of such

> orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, even to act legislatively (*Prentis vs. Atlantic Coast Line Co.*, 211 U. S. 210, 227, 53 L. Ed. 150, 159, 29 Sup. Ct. Rep. 67). But the guaranties of the Fourteenth Amendment do not entitle the carrier to the exercise by the courts of such extra-judicial authority."

This court as late as March of the current year, in *Roberts vs. Richland Irrigation District,* Pamphlet 11, Law. Ed. Advance Opinions, page 667, has redeclared this restriction binding it in against interference with duly made state rates, where it said that as against assessments for local improvements "the burden of taxation cannot be assailed under the due process clause of the Fourteenth Amendment unless palpably arbitrary and a plain abuse." It has become (in the absence of the presentation of this question) altogether too common an assumption that the federal courts could substitute their own judgments, and their own views, for those of the duly constituted local hearing authorities. We are not unmindful in pressing this point that the three-judge court which heard this case below, in a former appearance of the case (*Central Kentucky Natural Gas Company vs. Railroad Commission of Kentucky,* 37 Fed. (2d) 938), expressed its view that the court should hear the case *de novo*. That this decision is in conflict with everything that has been written by this court upon the subject, there can be little doubt. And that very opinion, however, remarked that the court was "not to be understood as holding that the parties may not by agreement try the case before us upon the same evidence heard by

the Commission," and in the statement just preceding this quotation, the court indicated that had the hearing been by agreement cast upon the evidence heard by the Commission, the court would have considered it solely to test whether it was arbitrary and capricious. And after that opinion was written the case was submitted (Record, p. 77), and heard and decided by the trial court upon that same evidence, neither more nor less than that heard by the Railroad Commission. The trial court (at the foot of record page 82) says that "the case is submitted on the evidence heard by the Railroad Commission."

And upon these considerations, therefore, it is submitted that the bill itself manifests that in the extensive hearings had upon pleadings, proof and briefs, complainant company has already enjoyed its constitutional right to a due process of law. The charge is not lightly made. There has grown up a sort of notion that there is not due process of law unless the law be court-administered law. The notion is as unsound as its unaccountable prevalence. Lawyers and courts alike seem to have had a sort of ingrown conception that until there has been a lawsuit there was no due process. The instant bill seems to rest uopn that same erroneous understanding of the law, for otherwise it assuredly would not have pleaded the quoted fullness (*supra*) and completeness of the commission hearing. And it follows, if we be correct in what we have said, and in our application of the decisions, that the original bill was wanting in equity, and manifested no ground for judicial interference with the decision of another of Kentucky's constitutional

hearing bodies, proceeding under the due formalities of the law.

If we be correct in the foregoing, the Gas Company's sole access to the court below was through the gateway of its amended bill (Record, page 59), wherein the company first asserted that the Commission hearing was meretricious and arbitrary. The amended bill, in the fact of its filing, concedes, it is submitted, what has been said here. It evidences the company's recognition of the prior insufficiency of its bill. It is fair to deduce from the fact of its filing how the company perceived that, under the statutory and constitutional powers conferred upon, and in this hearing exercised by, the Railroad Commission, it had had its day, its due process. And it gave, we think, assent to our position, *i. e.*, that the only avenue from this decision of the Kentucky Commission up to the courts, in this alleged case of confiscation, must lead through the basic charge that the state hearing was not upon the merits, was not in fact a hearing, but that the rate proceeding from that hearing was no more and no less than capricious and whimsical.

III.

So with the boundaries thus definitely set and fixed by this court, let us see whether the trial court kept within its field. It is submitted that it did not. Upon the contrary it approached the record just as if there had been no hearing before, and no decision by, the Commission. The opinion of the trial court (Record, p. 82) clearly discloses the trial court's attitude of mind about, and course in the decision of, the case. It went into the

record *de novo*. It discussed for itself the evidence about, and it ascertained for itself and fixed, the rate base value. It made up its own accountings of expenses and income. It arrived at its own figures on amortization and depletion. It just tried the case on its own conceptions of the merits. It evaluated for itself the testimony. The work of the Commission was not considered, not weighed, not mentioned. There was no effort to ascertain whether its result was upon evidence, or whether it was arbitrary. It expressed no view that the Commission had not accorded the parties a full and fair trial. It took the case on that very same record that was made up in the Commission hearing (Record, page 77). It received no new proof. In the end it substituted its own views for the due process views of the Commission. We reassert our right, as litigants, to differ with the reasoning of the trial court, and yet to reach the same end. We may take the 45-cent rate emanating from the Commission, left intact by the court's decree; and at the same time may urge that the court should have permitted the rate to stand, not upon any primary measuring out of the matter by its own mental processes, but upon its ascertainment, as it must have ascertained, that the Commission's action was not arbitrary. That we have the right, through wholly different mental processes, to arrive at the result fixed by the trial court's decree is settled by the wholly sufficient authorities, *supra*, of *Langnes vs. Green*, 282 U. S. 531, s. c. 75 L. Ed. 520, and *United States vs. American Railway Express*, 265 U. S. 425, s. c. 68 L. Ed. 1087.

We, within that right, do urge it that the trial court left undone what it ought to have done, and that it did

those things which it ought not to have done. It left undone any ascertainment of whether the Commission's result was upon reason. It took the case and decided it upon its own original inspiration and conceptions, as it ought not to have done.

It is submitted that this court, upon this hearing, will restrict itself to that inquiry. It may properly, it must lawfully, we deferentially submit, take the record as upon the query of arbitrary and meretricious action by the Commission. And finding no suggestion even of meretricious action the case will stand for an affirmance of the decree below which left effective the due process rate found by the Commission.

IV.

With the reservation founded upon the authority cited above that the courts, trial or appellate, have no right to interpose their own views for those of the Commission, until and unless there has been a prior ascertainment by the courts that the Commission's result was without reason, we proceed to discuss the case as though it rightfully were one of first impression in the trial court, and as though that court had the original right to decide upon the merits. We are impelled to take this course by the natural sense of prudence inhering in every litigant, in every lawyer. And we are happy in taking this course because it works out two desirable results:

(a) Not only that there was no prejudicial disregard by the Commission of the merits of the matter,

(b) But that above and beyond that the Commission's decision was fair.

The appellant here finds no fault with the ascertainment of the rate base values by the trial court. Boiled down, the assignment of errors solidifies into these two elements:

(a) The failure of the court to find a rate base value, operating expenses, and the like, on dates other than December 31, 1926.

(b) As a corollary to (a), the failure of the court to include the Owsley County forty-cent gas.

V.

Upon (a): In the assignment of errors V and VI (Record, pp. 105-6) it is complained that the court erred in fixing the rate base and in determining the income as of December 31, 1926; and in failing and refusing to determine these items as of January 28, 1927, the franchise date, and as of December 1, 1927, the beginning date of the sixty-cent temporary rate, and as of October 9, 1929, the date of the rate order.

Now the course of the court, in resting its fixation as upon this date, was amply fortified. It was exact. That statement rests upon these grounds:

1. The date was adopted at the invitation of the parties. The opinion of the court (Record, p. 84) states that "both parties desire the valuation to be fixed" as of December 31, 1926; and that "we are asked to fix the rate base and determine the income as of December 31, 1926." But the Gas Company, finding the results as of its own invited day to be undesirable, asked for revision or modification of the opinion, and the adoption of other basic dates. The trial court, however, denied the re-

quest. The facts were fresh in the minds of the judges. The hearing had been only a little while before. Their energies and reasons had exercised themselves, following the hearing, as of December 31st, 1926. When they wrote, they wrote incidentally about the request for that date. When later they were asked to adopt different dates, when their minds and memories were addressed precisely to that subject, they wrote of the matter, not incidentally, but directly; and fresh from the transpirings and events of the hearing, in an order entered on July 29th, 1932 (Record, p. 90), said this:

> "Upon the hearing of this cause the parties requested the court to fix the base value of plaintiff's property allocable to Lexington as of December 31, 1926, and determine whether the rate established by the commission aforesaid is a reasonable rate on such values as of said date. The court having acted upon such requests and made its findings and determinations as of said date * * * it is ordered that the petition for modification and amendment of the opinion be denied."

We are entitled to rely, of course, upon the integrity of what the three judges of the trial court thus stated and thus reiterated. This court's attitude of mind, its expression of its mental assurance in resting upon what the trial courts may recite in their opinions, is asserted in *Virginian Railway Co. vs. United States*, 272 U. S. 658, s. c. 71 L. Ed. 463, where you said:

> "Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true, where the case is in equity and the decree is entered upon a hearing involving complicated facts. For

> being in equity, matters of fact as well as of law are reviewable; and the reviewable issues of law are rarely sharply defined by requests for rulings. The failure to accompany the decree by an opinion may thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal. And the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor."

Railroad Commission of Wisconsin vs. Maxcy, 281 U. S. 82, s. c. 74 L. Ed. 717. Here a three-judge court entered an injunction against certain rates made by the Railroad Commission of Wisconsin, but the court "gave no opinion." This court reversed the three-judge court upon that ground alone, because "this court should have the aid of appropriate findings by the District Court of the facts which underlie its conclusions."

Hammond vs. Schappi Bus Line, 275 U. S. 161, s. c. 72 L. Ed. 216. Here the court stressed the importance of opinion discussion by the lower courts familiar with the local laws.

Lawrence vs. St. Louis-San Francisco Railway Company, 274 U. S. 588, s. c. 71 L. Ed. 1219, is as well in point.

As late as March 27, 1933, the court had occasion to consider the importance to its own work of opinions from the lower courts. In *Public Service Commission of Wisconsin vs. Wisconsin Telephone Company,* No. 517, October, 1932, Advance Opinions, Law. Edition U. S. Supreme Court, p. 670, the court wrote:

> "We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this court. While it is always desirable that an appellate court should be adequately advised of the basis of the determination of the court below, we have pointed out that it is particularly important that this basis should appear when the decree enjoins the enforcement of a state law or the action of state officials under that law. *Virginian Railway Co. vs. United States,* 272 U. S. 658, 675; *Lawrence vs. St. Louis-San Francisco Railway Co.,* 274 U. S. 588, 596; *Hammond vs. Schappi Bus Line,* 275 U. S. 164, 171, 172; *Railroad Commission vs. Maxcy,* 281 U. S. 82, 83. For then, the respect due to the state demands that the need for nullifying the action of its legislature or its executive officials be persuasively shown."

In *Missouri, K. & T. R. Co. vs. Elliott,* 184 U. S. 530, s. c. 46 L. Ed. 673, there was under debate whether and how the Kansas court had dealt with the question. This court said that the Kansas court had undoubtedly adopted a certain position about it, and then this:

> "We say this is undoubted, since the opinion of the Kansas City court of appeals recites that such was the contention, and the court proceeded to consider and decide it."

The court there put into exact statement our contention here. It accepted the recital of the trial court as to what, in that court, had been the contention of the parties. Can it accord less of faith to the recital, the recital repeated with emphasis and exactitude, that the litigants had asked action upon the December, 1926, date?

In *Thompson vs. Maxwell Land Grant Co.,* 168 U. S. 451, s. c. 42 L. Ed. 539, the court considered the usefulness and result of an opinion, made by law (as here) a

part of the record. Of the court's own opinions, it said that they might properly be examined to determine what matters were considered, and upon what grounds the judgment was entered. Then this:

> "Whenever a case comes from the highest court of a state for review, and by statute or the settled practice in that state the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment."

The Fifth Circuit in *Rademaker vs. E. D. Flynn Export Company*, 17 Fed. (2d) 15, thus puts it:

> "We think such opinion (that of a trial court) may properly be examined by an appellate court for the purpose of ascertaining the grounds on which rulings in the course of a trial were made, and judgment entered. *Gross vs. United States Mortgage Company*, 108 U. S. 477, 496; *Adams County vs. Burlington R. R. Company*, 112 U. S. 123, 129; *Virginian Railway Co. vs. United States*, 272 U. S. 658."

In *San Jose L. & W. Co. vs. San Jose Ranch Co.*, 189 U. S. 177, s. c. 47 L. Ed. 765, this court remarked that it "appears from the opinion of the court that plaintiff relied" upon a certain act of Congress, and that "the question considered by the court, and upon which the case turned, was whether the plaintiff had brought itself within the scope of that act." And then, making the opinion determinative of what occurred on the trial, this:

> "Under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the court and ruled against the plaintiff."

In the Fifth Circuit case the court expresses how it may ascertain from the opinion "the grounds on which rulings in the course of a trial were made"; and this court in the *Virginian* case said that "unless this court had that knowledge to be gained from an opinion of the grounds of the decision below, it is denied an important aid in the consideration of the case." And it is to be remembered and accentuated that the trial court, in its original opinion, stated that the date of December 31st, 1926, had been requested by both sides; and that when that opinion was challenged by a petition for modification, it more sharply, and more definitely, and more exactly, reasserted what it had thus said in its original opinion. Its mind was directly addressed to the subject, and it had no doubt upon the subject. It again recited that the parties had made the request "upon the hearing" for the date of December 31, 1926, and that "the court having acted upon such a request" it would stand by what it had done.

2. It will be recalled that the franchise contract is dated January 29, 1927; it will be reflected how nearly precedent to that time was December 31, 1926. It will be reflected how the company's valuation made up for rate purposes (see Kimball, Exhibit 4, Record, p. 112), was as of December 31, 1926. It will be reflected that the gas costs and other expenses in all of the tabular work appearing in the record addressed themselves primarily to that date. It will be reflected that beyond an extension by Mr. Kimball of certain figures on return to include the year 1927, there was no other period and no other date to which the proof was addressed. It will be reflected that there was no proof addressed to January 29, 1927,

nor to December 1, 1927, nor to October 9, 1929, the dates named in the assignment of errors. And from these reflections there flows, as there must flow, the conclusion not only that the Gas Company did not desire to address itself to any date other than December 31, 1926, but that it put into the record no proof upon other dates upon which might be predicated any rate base values, operating costs, expenses of operation and the like, all necessary prerequisites to the determination of a fair rate. So, it was natural that the parties litigant should have addressed their proof to the end of the year preceding the contract date by twenty-eight days as the proper time of measurement; and it was natural that they should have said to the court that they wanted a decision as upon that date.

3. The franchise itself forbids the possibility of a fixation of values, expenses and returns as upon different dates during the course of the litigation.

Let us look at the contract and to section 7 of it (Record, p. 34). That section of the contract provides how "after the expiration of two years from the date of the final determination of the rates and charges for natural gas," the same procedure as that from which this suit arises might again be started before the Railroad Commission on the instigation of either party. This, then, is the contract cycle: (a) the filing of a schedule by the company; (b) the hearing upon it before the commission; (c) the final fixation of the rate by that body; (d) and after two years a repetition of the cycle. Now, if appellant was right in its complaint that the trial court should have made its findings, in addition to those at the end of 1926, for the contract date of January, 1927, the

Owsley County gas date of December, 1927, and the commission decision date of October, 1929, one date after another during the progress of the hearing, it would not be restricted to its contract cycle, but would have its hearings multiplied many times over the contract provision, under conditions changing from day to day, under amended bills, under new proof addressed to the different days—and the protection which the city bargained for and got in its contract would be a wholly futile protection. The intent of the provision is obvious; and it is not to be read into the spirit of that contract and contrary to its plain intent that, as within these periodic fixations, there might be variations from day to day, and from time to time.

4. The fact that the appellant asks no fixation of values and rates as upon any day after the Commission's decision date of October, 1929, so far arouses a degree of mental curiosity as to cause us to speculate upon the underlying reason of the Gas Company. And speculating upon it, it is recalled how natural it would have been that the appellant, with faith in its insistence, should have urged it that the trial court should have made a decision as of the *date of its decree*, the autumn of 1932. In assignment of error III the appellant, indeed, complained that the trial court did not find, but should have found, the rate base value as of the date of the court's decree (September, 1932). But in its brief that date is forgotten. The appellant asked of the trial court, and in fact obtained, a *de novo* consideration of the entire matter at the court's hands; and if the court had the right to hear it originally, and to adopt its own conclusions, rather than those of the Commission, would it not be

expected naturally that the Gas Company should insist in its brief, as it does in its assignment of error, that the trial court's findings should cover also September, 1932, the date of its findings? And we wonder whether this had anything to do with it? In 1929, more precisely in October, 1929, materials, and labor, and the cost of everything bought and to be bought with money which went into the reproduction values of the Gas Company, which went into its annual expenses, which entered in, and in every particular into, a finding as of that date, were at their peak of prices. And then came the depression; and depression upon depression. And in the autumn of 1932, when the trial court decided the case, the cost of material and labor and everything that went into the rate base values and annual expenses of the company were cut perhaps near half in two. And everything with which the Company had to do in its relation to Lexington was cheapened for it—everything that had to do with this controversy, save the price at which it was selling gas to Lexington. The subject was in appellant's mind. Its brief says that "there was no economic depression in this country in February, 1927." It might with equal precision have said that there was none until near the end of 1929. The appellant employs public knowledge and judicial notice as the basis of the statement. It is a matter of common knowledge and judicial notice that until October, 1929, all commodity, all labor, all financing and material prices were high. It is equally the subject of such knowledge, general and judicial, that since October, 1929, the price trend has been steadily downward to the extreme low of the autumn of 1932, and on to the present. The high current prices as manifested

in the engineering set-up in this case were the natural result of the free-play of the gambling mania of the times, the pushing of enterprise beyond anything that was normal or healthy, cars for everybody, steel for their construction, unprecedented activity in the building trades, labor asking and taking its own highest prices. The low prices of the autumn of 1932, and of this day, sharply contrast the spirit of October, 1929, and the years preceding it. If the appellant is entitled in this record to a decision of a day other than that of December 31 1926, to which the entire record addresses itself, then upon its own theory of the case, and its own assignment of error, its other day should be that October day in 1932, when at its instance the trial court decided the case on its own conceptions of values, expenses, amortization, and the like. And if it be said that there was no proof in the record addressed directly to this date, so also it is to be said that there is no proof in the record addressed to January 28, 1927, and no proof in the record addressed to December 1, 1927, and no proof in the record addressed to October, 1929. And as well it may be said that when the trial court came on to consider the matter and to decide it, it had a means of knowledge peculiarly its own. It had the right (if it had the right to adopt any other day than that which, according to its own opinion, the parties had invited it to adopt) to exercise its own knowledge, its own current information gathered from the press, from the contact of its members with the banks, and business men, about the unemployed labor, the idle cars, the tremendous recession in the values of the stocks of sound and seasoned corporations engaged in the great industries of the country, the rails, the steels, the motors, the coals, the oils, and others. The

court had the right to apply its own knowledge, its judicial knowledge, the knowledge not only that it might chance to have acquired in the ordinary run of intelligent minds abreast of current affairs, but such as it might obtain upon direct and current inquiry. The brief for the appellant concedes that the court may take judicial knowledge of a fact of geography, the (alleged) proximity of Lexington to the coal fields, and of a matter of commerce, the "keen competition" between gas and coal. It will not deny, therefore, it would seem, the propriety of utilizing the doctrine of judicial notice here. The authorities are clear:

The Bank of Kentucky vs. The Adams Express Company, 93 U. S. 174, s. c. 23 L. Ed. 872. Here the court succinctly put it thus:

> "We cannot close our eyes to the well known course of business in the country."

Nicol vs. Ames, 173 U. S. 509, s. c. 43 L. Ed. 786. The court thus expressed the same idea in these words:

> "We have the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country."

Banton vs. Belt Line Ry. Corporation, 268 U. S. 413, s. c. 69 Law. Ed. 1020. This is a rate case. It is directly in point. The court said as of direct application here:

> "It is well known, and the court will take judicial notice of the fact, that the purchasing power of money has been much less since 1917 than it was in 1912, when the order was made; and that the cost of labor, materials, and supplies necessary for the proper operation and maintenance of street railways has greatly increased."

Of course, it follows that the court will take judicial notice as well of the converse condition, that the cost of labor, materials and supplies is now greatly reduced since the proof was taken herein.

Simpson vs. The United States, 252 U. S. 547, s. c. 64 L. Ed. 709. Here the court said that it would take judicial notice of what was the fair value, or earning power, of money safely invested.

Lincoln Gas & Electric Light Company vs. City of Lincoln, 250 U. S. 256, s. c. 63 L. Ed. 968. Here the court took judicial knowledge of World War increases in "the costs of labor and supplies of every kind."

The same law might be extended indefinitely; but it does not seem worth while to go on with so obvious an argument.

Professor Thayer in his "Preliminary Treatise on Evidence" says of judicial notice that "it is an instrument of great capacity in the hands of a competent judge, and it is not nearly as much used in the region of practice and evidence as it should be. * * * The failure to exercise it tends daily to smother trials with technicalities, and monstrously lengthens them out."

Upon the subject of the acquisition by the court of the facts which might be the subject of judicial notice:

It is not to be thought that the members of the trial court were to be restricted, in the application of judicial notice, to the generality of public knowledge upon the subject under consideration. Thus, while the courts may take judicial knowledge of the ebb and flow of the tides, of the periods of the moon, of the confluence of rivers, of maps and calendars, and the like, there is always *ex necessitu* occasion for the sitting judge, or judges, to

look to the tidal reports, the phases of the moon in the calendars, the geography of the land, and the like, in order that they may have knowledge to make worth while and of real value its application.

Jones vs. United States, 137 U. S. 202, s. c. 34 Law. Ed. 691. The court here thus broadly laid its own concept of how ever open to it were all channels which it might consider reliable. It wrote:

> "In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. * * * Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. * * * As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State."

Brown et al. vs. Pieper, 91 U. S. 37, s. c. 23 Law. Ed. 200. This opinion says:

> "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he deems safe and proper."

The experiences of the trial judges had fitted them to weigh these reflections and these values. They were permitted to inform themselves from their own reliable selections of sources of information. And had the appellant requested of the court a fixation of values and

of expenses and of rates of return as of the time when the court decided the matter, it must have met and experienced a result much unhappier to it than that which flows from the adoption by the court of the date, the end of 1926, the end of the year, just twenty-eight days before the making of the franchise contract, the date to which the court said it was invited to address itself, that date to which the record addressed itself in wholly largest part.

5. Since the preparation of the foregoing, stimulated by appellant's flat statement outside of the record, that it had not asked a fixation as of December 31st, 1926, it occurred to us to search our memories, and all that had transpired in the prolonged history of this case, for something that might put at rest this undesirable contradiction between the trial court and opposing counsel. We were disinclined to put in our own statement of the happenings at the oral hearing, notwithstanding that the direct statement of counsel that they did not request the December, 1926, date should leave us ethically free to recount the events as we remembered them. We find, we think, effective settlement of the contradiction; and we find, we think, full support of what the court said. On page 16 of the record, in the bill in the instant case, twice appears this:

> "December 31, 1926 (the date certain in this case)."

Again, at page 24 of the record, the bill charges that the act of the Railroad Commission in fixing the rate for any date prior to the effective date of the contract was void, from which there is the natural deduction that what

was in the appellant's mind was that a fixation as of the contract date would have met its approval. But the appellant has made its position yet more definite.

This oral hearing was in March, 1932. More than two years prior to that hearing the Gas Company filed its brief before the three-judge court. Naturally that brief was before the court when it came to consider the matter finally before the handing down of its opinion in the summer of 1932. Reverting to that brief, we find in it, at pages 65, 66 and 67, this:

> "While we submit that it is clear enough that the parties intended the court should as between them decide not merely the federal question as to whether the Commission rate was confiscatory, or invalid on any other ground, but should also ascertain and fix just and reasonable rates; it is equally clear that they understood *such court fixation should be as of the date of the contract,* and not a legislative fixation of rates for the future, since by Section 7 the parties have themselves determined how long such rates should be binding on them, before either could move for a modification. *We therefore contend that the ascertainment of just and reasonable rates and charges by the court as of the contract date becomes a judicial decision of a just and reasonable charge for a past service, and not a legislative fixation of rates for a future service.*
>
> As further bearing on this question we desire to direct the attention of the court to the fact that both parties have by common consent adopted December 31, 1926, as the date on which the value of the used and useful property should be ascertained, that being the nearest convenient and practicable date to the contract date, and the valuation date to be adopted by the court must be of the same date and not the date of the judicial inquiry.

> Again, *it is inherently necessary that the just and reasonable rates and charges must be as of the contract date,* because the right of the company to just and reasonable rates and charges begins with the beginning of the service. The impoundment began at the same time, and we now have in *custodia legis* a fund, the right to which is to be determined by the just and reasonable rates for the service on account of which the impounded money was collected. We therefore submit that the court, having custody of a fund claimed by both parties, must, in order to distribute that fund, decide to whom it belongs, and that as a necessary prerequisite the court must first determine the just and reasonable rates as of the contract date. * * * The court did not order this impounded money to be paid in, and the court can not award it to anyone without deciding to whom it belongs, and as already stated, such decision can not in the nature of things be rendered without first fixing the just and reasonable rates for the service rendered as of the date of the contract, for it is on that predicate, and that alone, that the ownership of the fund can be determined."

There is an issue of memory between the trial court and opposing counsel. The high-grade and excellent lawyers who wrote that brief are the same as those appearing on the Gas Company's instant brief. An original of the imprinting of that brief is filed as an appendix hereto. It is very certain that, their memories being recalled to what they wrote more than three years ago, they will be the first to welcome the light that their former brief may shed upon the matter.

So upon these five grounds it is submitted that the trial court rightly took December 31, 1926, as the date

from which it should view the controversy. It is submitted as well that the appellant is in error when it urges in its instant brief that there was presented to the trial court for decision, either

"(1) The rate base *as of the contract date, and for the period from that date to the date of the Commission order* (The Gas Company's italics), or

(2) The rate of return, for the same period."

That a party may not thereafter alter a position taken by him in a legal proceeding needs neither argument nor authority. The estoppel thus worked is stated succinctly in *Davis vs. Wakelee,* 156 U. S. 680, s. c. 39 L. Ed. 578.

VI

Upon (b), *supra,* the fact that the trial court did not include the Owsley County 40-cent gas; some ten months after the making of the franchise contract the Gas Company began to serve to its patrons, as a part of their consumption, certain gas from Owsley County, Ky., turned into the lines under a contract of date subsequent to the franchise contract, made between the appellant company and the Petroleum Exploration, the concern which owned this Owsley County gas. For this gas the appellant contracted to pay 40 cents per thousand. The Gas Company charges error in the failure of the trial court to include in its calculation the cost of that gas. The court below, in its response to the petition for modification (Record, p. 90), remarks how the Gas Company "did not begin taking gas under this contract until November of 1927," and how, therefore, it could not enter

into a computation rested upon December 31st, 1926. Passing for the time their full right to rest upon the date of December 31st, 1926, as rightly determinative of the matter, the appellees, in full duty to their case, extend this discussion to throw light upon the fairness of the results reached by the Commission below, even if this Owsley County gas be included. And upon this we present the orderly sequence of conditions:

On December 31, 1926, ended the last round full year before the making of the franchise contract. So to that date naturally were addressed proofs of values, costs and the like.

On January 28, 1927, the franchise contract was adopted.

On February 26, 1927, there was filed the complaint before the Railroad Commission, the proceeding out of which the present suit arose.

On March 24th, 1927, the Central Kentucky contracted with the Petroleum Exploration for the Owsley County gas (Record, p. 178). The contract evidencing the purchase first appeared a year or so later, when the case was under preparation. It was a condition subsequent. The city had no voice in its terms or long duration.

In late November, 1927, the Owsley County gas began to be supplied, a condition subsequent.

In November, 1927 (Record, p. 208), the Columbia Gas and Electric Corporation, a subsidiary of which, the United Fuel Gas Company, was selling gas to the Central Kentucky at a high price, bought the Central Kentucky. This, too, was a condition subsequent.

So at the identical time when the high priced Owsley County gas came in, the high priced United Fuel gas went out.

So when the Owsley County gas came in, the other chief source of supply of the appellant company was from the United Fuel Gas Company; and the United Fuel Gas Company (Record, p. 175) was an one hundred per cent subsidiary of, and an integral part of, the Columbia Gas and Electric Corporation; and the Central Kentucky Company, the appellant, to the extent of 5995/6000, was a subsidiary of, and an integral part of, the Columbia Gas and Electric Corporation; and the Central Kentucky Company in buying from the United Fuel Company, was buying from itself, and the United Fuel Company in selling to the Central Kentucky Company was selling to itself; and this court in a late Kentucky natural gas case, *The United Fuel Gas Company vs. Railroad Commission of Kentucky*, 278 U. S. 300, s. c. 73 L. Ed. 390, wrote this:

> "We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary, or a corporation owned by its stockholders."

Reflecting about what is fair, the question is put whether if the December 31st, 1926, status is to be disregarded as on account of the Owsley County gas, the price here to the citizens of Lexington is to be boosted for the some seven years of this litigation upon the fiction of what the Central Kentucky Company had to pay to the commonly owned United Fuel Company during a

portion only of the first year of the seven years. There can be but one answer.

If, upon the contrary, the case is to be considered as appellant would now have it (and in complete reversal of its former position, as reiterated by the trial court) in the light of subsequent conditions, and if the rate is to be affected by conditions that came into being after that time, if the appellant is to get any benefit that might accrue to it out of consideration of the Owsley County gas, it must as well accept the other changed condition, the complete unity of the United Fuel and Central Kentucky companies, effective in the very same month (December, 1927) that the Owsley County gas was turned into the lines. A case pertinent has recently enlisted the attention of the court, that of *Western Distributing Company vs. Public Service Commission of Kansas*, 285 U. S. 119, s. c. 76 L. Ed. 655. The case will well repay reading. The gas company there went before the commission with an application for higher rates. It developed on the hearing that, when the old rates complained of were established, the distributing company and the producing companies were distinct entities, and that the gas bought and sold between them was at forty cents per M. c. f. Afterward the two companies came under common ownership. In view of this fact, the commission insisted that, in order to determine the reasonableness of the requested increase, inquiry must be made as to the propriety of the forty-cent wholesale rate. The company declined to make any showing with respect thereto, because (it claimed) the commission was bound to accept the inter-company rate as a proper element of cost in fixing the retail sale. The commission thereupon dismissed

the application for an increase; and the matter came into the courts. The District Court dismissed the bill, and the case came here. Here this was written:

> "Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the cost which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction."

This Kansas case received the attention of the trial court in the instant case. It believed its doctrine to be inapplicable here because (Record, p. 85) inasmuch as

the court here was "asked to fix the rate base and determine the income as of December 31st, 1926, we are of opinion that for such purposes we should accept the contract price of gas purchased from the United Fuel as part of the cost of operation." It remarked (Record p. 85) that as of the date selected by the litigants "the United Fuel and the Central Kentucky Natural Gas Company had no relation to each other by reason of common ownership of stock at that time." It is obvious enough that had the court been dealing with, been asked to deal with, rate bases and gas costs as of a date *after* the affiliation of the two companies, it would have taken stock of, and have excluded, the high priced intersubsidiary gas; and as upon appellant's request for a later date of its own selection, we may well surmise that it would have written, as this court wrote further in this Kansas case, this:

> "All of these facts * * * would be more persuasive with respect to the propriety of the rate if the parties were independent of each other and dealing at arm's length. Where, however, they constitute but a single interest and involve embarkation of the total capital in what is in effect one enterprise, the element of double profit and of the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny before the question as to the lawfulness of the retail rate based theory can be satisfactorily answered."

Smith vs. Illinois Bell Telephone Co., 282 U. S. 133, s. c. 75 L. Ed. 255, is in point as well.

The Right of the Whole Matter

Computations in appellant's brief, even upon its own theories, are not satisfactory. They rest upon surmise and estimate. They produce figure upon figure of how the result might be altered if the weather were this or that, and if the consumption went down as the price went up. Would it not be fairer to adhere to the actual record facts? Let us, out of this turmoil of figures, see whether we cannot get down to something that the practical minds of practical men may accept. Let us discard for the time the sundry estimates and the sundry theories of the experts. Let us get away from the Columbia's purchase price; for it is submitted that the price paid for the property by the Columbia was high. There was a very good reason for the Columbia to pay high. In the first place, there was the urge of that element, the desire of the large utility interests, for complete and exclusive control in the territories where they might be dominant. In the second place, there was another bait, an invitation for the payment of large price, the gambling instinct to take a chance inherent in most men, the chance being in that near million dollars of impounded funds that awaits the determination of this litigation. Let us see whether we can go to any basis in the entire record that is devoid of theory, and devoid of everything but ascertained fact.

Let us go to Mr. Jirgal's work. He tells us what he did. It is worth while to understand what he did. At page 228 of the record he says that he "went to the books of the Central Kentucky Natural Gas Company and to the books of the Lexington Utilities Company"; that from them he ascertained all costs; and that, in sub-

stance, then he had adjusted his figures (Record, p. 229) to "the actual cost expressed in 1926 dollars," and then this:

> "Q. In the ascertainment of the value in your Exhibit No. 1, the assessment was based upon fact or theory? A. On facts.
> Q. Gotten again where? A. Gotten from the records of the company."

So let us get a rate base as upon Mr. Jirgal's actualities. We go to the opinion for this information. It says (Record, p. 83) that Jirgal found the historic cost of the entire plant to be $2,653,035.00; and that allocating to Lexington its 55.1 per cent (Record, p. 83) left the values, the actual ascertained values from the Company's own books, as evaluated upon 1926 conditions to be for Lexington $1,461,822.00.

Then, while the opinion does not manifest it, Mr. Jirgal's own work does manifest it. At page 229 of the record he says that the "adjusted cost of the Lexington Utilities Company's property as of December 31, 1926," was $383,152.00. Let us add these two sums:

Jirgal's ascertainment of the Lexington values of the appellant company	$1,461,822.00
Jirgal's actual values of the Lexington Utilities property	383,152.00
Total actuality as adjusted to 1926 conditions	$1,844,974.00

Now Mr. Jirgal further explains (Record, p. 229) how "these figures manifest nothing of depreciation; they are as the property would stand today, without anything having been taken off for depreciation." So we depreciate them; and utilizing the figure of depre-

ciation, that of 9.4 per cent, to which the company cannot object, since that is its own claim (Record, p. 222), we get a depreciation of $173,427.00; so Jirgal's actuality of values, depreciated according to the per cent employed by the company, is thus:

Jirgal's historic cost of both properties	$1,844,974.00
Less 9.4% depreciation	173,427.00
The actual cost as upon 1926 conditions	$1,671,547.00

To that rate base then, the only one free and clear of all conjecture, the only one unhampered by market conditions, we turn as a sure guide, and applying the figures to the year 1926, we get *definite and exact record,* and not estimated, *results.* We bring down these actual results from Mr. Kimball's (the company's) table at record page 116a, save that from the sales shown there of $652,509.00 at 50 cents, we deduct 5 cents per M. c. f. from the sale price to get down to the 45-cent rate of the Commission. This deduction equals 1/10, or $65,250.00. So we have:

Sales for 1926 at 50c	$652,509.00
Less 5c per M. c. f.	65,250.00
1926 sales at Lexington at 45c	$587,259.00
To which, for total income, we add (see the same company table) these additional income items:	
Gasoline	$ 6,339.00
Shop	4,471.00
Interest	836.00
Miscellaneous	375.00
Total income, 1926, gas sold at the Commission's 45c rate	$599,280,00

Then we go to that same table (Record, p. 116a, last column) for the outgo in the same year, as per the trial court's system of itemizing, and as per the company's own manifestation. We find these items, last column, page 116a:

Field and main line expense	$ 27,539.00
City plant expense	42,621.00
General expense	18,954.00
Gas purchased (see post)	238,133.00
Taxes	40,155.00
Total actual expense	$367,402.00
To this we add the court's estimates (and since the items are of amortization and the like, there can be no actuality to employ):	
For amortization, the company	50,000.00
For amortization, the Lexington Utilities Co.	10,263.00
Extraordinary maintenance of company's property	10,000.00
Do. of Lexington Utilities property	5,000.00
Total actual outlay, plus the trial court's amortization, etc., allowances	$442,665.00
So we come down to results:	
Income, actual, on 45c rate	$599,280.00
Actual expense, plus estimated amortization	442,665.00
Net for return	$156,615.00

Now Kimball's actual value for both properties, as depreciated upon the company's 9.4 per cent condition, is $1,671,547.00; and upon this the return in dollars, just arrived at, of $156,615.00, is 9.4 per cent.

This calculation, again it is emphasized, has gone to the actualities, book figures themselves, for every single figure used in the calculations, except the estimatory ones of amortization and extraordinary annual upkeep. Some three observations, however, may be made with regard to it:

(a) The gas costs of $238,133.00 are taken from a table of Mr. Kimball's, at page 120 of the record, by taking the average mean between the 40-cent and 50-cent selling rate costs ($219,259 cost at 40c selling rate, plus $257,007 cost at 50c selling rate, divided by 2 for the 45c selling rate costs, equals $238,133.00).

(b) The computation includes the trial court's allowances of amortization costs of $50,000.00 for the company, and $10,263.00 for the Lexington Utilities, on nothing more substantial than the unsupported estimate of Mr. Kimball, a total of $60,263.00 per annum, for which there is no sort of record justification, a statement to be elaborated hereafter. And $60,000.00 is in itself an income of around 3.75 per cent upon the Jirgal value of $1,671,547.00; and the 9.4 per cent, just arrived at, and 3.75 per cent, the increase if the guessed-at amortization figures be excluded, make a total of 13.15 per cent.

(c) In going to this actuality we have not taken in the theoretical intangibles. We now do so. As fixed by Mr. Kimball, they amount to $252,000.00 (Record, p. 236). If they were to be added to the Jirgal rate base of $1,671,547.00, we would have a total rate base, Jirgal's actualities, plus the company's self-fixed intangibles, of $1,923,547.00. The return just ascertained of $156,615.00 is a return of 8.1 per cent upon this total of $1,923,547.00.

Suppose, on top of these actualities, we take the appellant at its extremest position, and extend these actual results to include the Owsley County 40-cent gas:

(a) In 1926 there was sold at Lexington 1,303,000 M. c. f.

(b) Lexington's allocation, 55 per cent, of the Owsley County contract quantity of 750,000 M. c. f. is 412,500 M. c. f.

(c) 412,000 deducted from the total of 1,303,000 M. c. f., leaves 809,500 M. c. f. from sources other than Owsley County.

(d) Adhering to the right demanded by an instinctive sense that if the Owsley County gas of December, 1927, is to come in, the intersubsidiary United Fuel premerger contract price must go out, we go to Mr. Kimball's table of gas costs, other than that of the United Fuel, at page 118a of the record, thus:

Year	Total Feet Bought	United Fuel	Net Bought
1922	2,857,999	1,501,323	1,356,676
1923	2,570,664	1,535,583	1,035,081
1924	2,700,197	1,198,486	1,501,711
1925	2,876,879	940,507	1,936,372
1926	2,607,861	955,126	1,652,735

Total feet bought other than United Fuel 7,482,575

And again:

Year	Total Dollars Paid	Paid United Fuel	Net Dollars
1922	$406,650	$260,247	$146,403
1923	419,661	307,116	112,545
1924	430,299	239,697	190,602
1925	484,814	188,101	296,713
1926	432,701	191,025	241,676

Dollars paid less United Fuel $987,939

We then have only to divide the $987,939 by 7,482,575 feet to ascertain the five-year average cost per thousand paid by the Central Kentucky to have been 13.2 cents.

Then the calculation of gas costs for 1926, counting in the Owsley County gas, and counting all other gas at this 13.2 of actuality, results as follows:

412,500 M. c. f. from Owsley County at 40c	$165,000.00
890,500 M. c. f., the remainder, at 13.2c	117,546.00
Total gas costs	$282,546.00
Less gas costs as they actually were (see *supra*) as on December 31, 1926, *supra*	238,133.00
Excess of cost including Owsley gas	$ 44,413.00
Then to get net income for 1926, we must, from the actual ascertained revenue of	$156,615.00
deduct this extra gas cost of	44,413.00
leaving net revenue of	$112,202.00

Now 7 per cent on $1,671,547.00, the Jirgal actuality of value, is $117,008.00, only some $4,846.00 in excess of the $112,202.00 just arrived at by counting in the Owsley County gas—that very thing that the three judges said, and upon challenge, repeated, that they were asked not to do. And this inconsiderable $4,846.00 is not much of a drain upon the upsupported $60,000.00 plus, of amortization charges taken stock of in this calculation.

In the face of these figures, is the court prepared to say that there should be injunction against the Commission's rate of 45 cents, when it approaches a solution of the case in that temper of mind that it expressed in the

San Diego L. & T. Company and *Knoxville Water* cases, elsewhere cited herein, in these words?

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

And, it is submitted, therefore, that if this court should measure the case *de novo*, if it should decline to restrict its hearing to the question of meretricious and arbitrary action, it must find itself circumstanced by these actualities in favor of the fairness of the rate order of 45 cents of the Commission, left effective by the trial court. And considering the nature of appellant's speculative proof, as measured by these actualities, we have felt the impelling force of what one of the supreme court justices has said in balancing the effect of testimony. He wrote that proof implies persuasion; that to compel the human mind to infer in any respect that which observation and logic tell the human mind is not true, interferes with the process of reasoning; and that it would be a departure from the unbroken practice to require an artificial legal conviction where no real conviction exists. And it is our conclusion that the court, in reading this record, can, in the application of its reasoning faculties, be subjected to no conviction that the 45-cent rate is confiscatory of appellant's propeity.

VII

While the foregoing calculation has rested upon the company's own manifestation of gas cost, there is something more to be said upon the subject. The Company Exhibit 4, Sheet 14 (Record, p. 118a), manifests that all of the gas purchased by it was at 10 cents per M. c. f., save from the following producers, and at the following prices, to-wit:

United Fuel Gas	20 cents
Kentucky Cities Gas Company	17.5 cents
Bed Rock Petroleum	12 cents
Petroleum Export Company	15 cents
Hillsdale Gas Company	20 cents
Lewis Vincent	20 cents

These figures, for illustrative purposes, are based upon gas sales at 40 cents. The cost under two or three of the contracts would be somewhat higher if the sale price were at 50 cents; but the figures given will suffice for what we have in mind, and that is this: the contracts under which was purchased the gas supply from these just named producers are in the record. We treat of them separately:

(a) The United Fuel Gas Company: Throughout all, save the first few months of the time covered by this litigation, the United Fuel Gas Company and the Central Kentucky Company, by virtue of their common ownership by the Columbia, were a unit. They were one and the same. The transfer of gas from one to the other was a transfer from self to self. And the money paid from one to the other, was money paid from self to self. And while it is reiteration, it is again emphasized how, all

other considerations laid aside, it is spiritually unfair for the company to sell its gas at Lexington at a price elevated on any such specious theory as that of resting it upon a supposed purchase and sale price between one and the same owner.

(b) The Kentucky Cities Gas Company: If we turn to the record at page 242, we find that this contract was cancelled before the Owsley County gas came in.

(c) The Bed Rock Petroleum: The contract for this gas (Record, p. 243) calls for 8 cents per M. c. f. At one time it seems to have been raised voluntarily to 12 cents. The record does not disclose which is correct.

(d) The Petroleum Export Company: The Gas Company, though asked to put into the record all of its gas purchasing contracts, did not put in any Petroleum *Export* Company contract; and if it be a typographical error for Petroleum *Exploration,* that is the Owsley County contract for the 40-cent gas, taken care of elsewhere in this discussion.

(e) The Hillsdale Gas Company: We find (Record, p. 244) that this contract calls for 720,000,000 feet per annum, and that as a matter of fact, and in the very second year, 1926, of supply under it, the production amounted to only 560,000,000 feet; and we find that there was a provision in this contract affording the Central Kentucky Company the right to cancel it whenever the supply should fall below 500,000 feet per day in the winter.

(f) The Lewis Vincent: Under the terms of this contract (Record, p. 246) the Central Kentucky Company is not required to take the gas for any longer

period than that company "in its judgment" finds it profitable to take the gas.

The result of this scansion of the terms of the gas purchase contracts is that the Central Kentucky was bound by contract to take not a foot of gas at above 10 cents per M. c. f. from any person or company save the Petroleum Exploration for the Owsley County gas, and possibly the Hillsdale Company; and buying gas elsewhere at 10 cents, and having to pay not in excess of 10 cents for any gas save the Owsley County and possibly the Hillsdale, it is fair that the calculation above named be further revamped, and that the price of 13.2 cents arrived at for all gas other than the Owsley County gas, should be supplanted by the more accurate and just cost figure of 10 cents per M. c. f. Upon that basis the figure of $117,546.00, shown above, would be reduced to $89,-050.00; and the cost of gas, upon the theory of including the Owsley County gas at 40 cents, and all other gas at the thus established price of 10 cents, would be $254,-050.00 in place of $282,546.00; and this with the further result that the counting in of the Owsley County gas as opposed to the December 31, 1926, conditions, would be at a disadvantage to the Gas Company of some $28,496.00 per annum ($282,546.00 minus $254,050.00 equals $28,-496.00).

VIII

The trial court, substituting its own conclusions for those of the Commission, conceived it that a rate of fifty cents was adequate. It offered the Gas Company the benefit of that rate, and to enjoin the forty-five cents

fixed by the Commission, conditioned that the company would accept the fifty cents as a finality, and thus end this particular hearing. The company declined the proffer; and the court declined to enjoin the Commission's rate. Of that action the Gas Company complains. Two reasons, one of equity, and one of fact, support the action of the court, (a) the legal one in the court's right to demand equity of the suitor, as a condition to granting equity, and (b) the one of fact that the court allowed an annual amortization charge of fifty thousand dollars, unsupported by the record. These two bases for the decree are discussed under the next succeeding two heads.

IX

The equitable basis, of course, for the court's action is to be found in the maxim that he who seeks equity must do equity. The maxim, as stated by Pomeroy (Equity Jurisprudence, Section 385), is rested upon settled juridical notions of morality, and upon conscience and good faith. Said the writer:

> "The court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy. It says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject matter of the suit."

The exact application of the maxim here was, in the court's view, that fifty cents was enough; that any less would be not enough, and that any more would be too much; and the court's opinion and decree worked out a calculation arriving at that result. It knew that the litigation had been pending many years; it knew of the impoundment feature; and it knew how many dollars were tied up, useless to those who might be entitled to the money. It knew how desirable it was to have the fund distributed in these needy times. And it said to the Gas Company that the court would give it the benefit of the fifty cents, if the Gas Company would do equity and accept the fifty cents. This, it is submitted, the court had the right to do. Under the authorities it particularly is within the province of courts of equity to grant injunctions on condition. The doctrine has had a widespread application. It has been applied, *inter alia*, in rate cases. We cite the following:

1. *Public Service Railway Co. vs. Board*, 276 Fed. 979, 990, a three-judge case from New Jersey. The court wrote:

> "Anticipating that the court might name a new rate as a condition of an injunction against the old one, counsel for the board have quite pertinently called the court's attention to the fact that it is not a rate-making body and have made the point that if the court name a rate as a condition for granting an injunction, it would, in effect, fix a new rate and would thereby exceed its function. That it would exceed its function as a rate-making body is very true, because not being such a body, it has no such function. But that in so doing it would exceed its power as a court of equity is not true. Injunction is one of the equitable remedies

over which the court has jurisdiction. The remedy of injunction may be granted in the terms of the prayer or it may be granted only upon condition that the party seeking equity shall do equity, as in this instance, that the company shall consent to charge a fare no greater than what the court deems necessary to avoid confiscation. If the naming of a condition is in effect the fixing of a rate, the sanction for the court's act is in the injunction and in the circumstances that make injunction imperative. This rule is ancient and of wide application. *Walden vs. Bodley,* 14 Pet. 156, 164, 10 L. Ed. 398; *State R. R. Tax Cases,* 92 U. S. 575, 23 L. Ed. 663; *Cummings vs. National Bank,* 101 U. S. 153, 25 L. Ed. 903; *People's National Bank vs. Marye,* 191 U. S. 272, 282-288, 24 Sup. Ct. 68, 45 L. Ed. 180; *Amarillo vs. Southwestern T. & T. Co.,* 253 Fed. 638, 165 C. C. A. 264; *Toledo vs. Toledo R. & L. Co.,* 259 Fed. 450, 458, 170 C. C. A. 426; *Consolidated Gas Co. vs. Newton,* (D. C.) 267 Fed. 231, 273, 274."

2. *City of Toledo vs. Toledo Railway & Light Co.,* 259 Fed. 450, 458, C. C. A., Sixth Cir. before Judges Warrington, Knappen and Denison. The court wrote:

"It is likewise plain that, when an injunction is asked to restrain the enforcement of an unreasonable rate, the court may make its order conditional upon the doing of equity by plaintiff to consent to charge no more than what seems to the court to be reasonable."

3. *Consolidated Gas Co. vs. Newton,* 267 Fed. 231, D. C., S. D., N. Y. Here Judge Learned Hand (page 274) wrote:

"There is no doubt that, viewed as power alone, I might absolutely fix a rate as a condition of granting any injunction, and it makes no difference whether that rate lasted six months or six years."

4. *Newton vs. Consolidated Gas Co.*, 258 U. S. 165, s. c. 86 L. Ed. 538. Here on appeal from Judge Hand's decree, just above, the Supreme Court said that it was within Judge Hand's discretion to grant the injunction upon terms.

5. *Kinney Coastal Oil Co. vs. Kieffer*, 277 U. S. 488, s. c. 72 L. Ed. 961. Here the court said:

> "It is a general rule that a court of equity, in a suit of which it has and takes cognizance, may administer complete relief between the parties, even though this involves the determination of legal rights which otherwise would not be within the range of its authority. And under that rule a court of equity, in awarding relief to one party, may impose conditions protecting and giving effect to correlative rights of the other."

6. *Holden Land and Live Stock Co. vs. Interstate Trading Co. et al.*, 233 U. S. 536, s. c. 58 L. Ed. 1083. This is an interesting case, and an interesting application of the maxim. It originated in the State Court of Kansas. The state court rendered a decree quieting the plaintiff's title to certain lands, provided the beneficiary of the decree would pay over certain moneys, controverted in amount, but definitely fixed by the Kansas court. From this conditional decree the case came up to this court by writ of error. This court dismissed the writ, in these words:

> "The judgment thus rests upon an independent or non-federal ground which was adequate to sustain it. The court applied a familiar equitable principle in defining the basis upon which extraordinary aid would be given. 'A court of equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a dis-

> cretion on the subject, and may prescribe the terms of its interference.' Story, Eq. Jur., Sec. 301; *Fanning vs. Dunham*, 5 Johns. Ch. 122, 142, 143, 9 Am. Dec. 283; *Tiffany vs. Boatman's Sav. Inst.*, 18 Wall. 375, 385, 21 L. Ed. 868, 879. It is manifest that the plaintiffs were not proceeding by virtue of any federal right in seeking to have the conveyances which had been executed in the form of absolute transfers of title declared to be mortgages; and it was competent for the court whose intervention was desired for this purpose, to demand that its conscience be satisfied by the doing of equity on the part of those who asked it."

7. *Lasswell Land and Lumber Co. vs. Lee Wilson & Co.*, (C. C. A. Eighth Circuit), 236 Fed. 322. Here the circuit judge writing expressed himself with concise illumination. He wrote:

> "The rule is universal that he who seeks equity must do equity. Much more, in our opinion, is it true that an applicant for equitable relief must submit himself to the requirement to do equity."

There are many additional cases. It is believed that those cited and quoted from are sufficient to make patent the broad range of the subject. The trial court took the matter by its four corners; and after applying its own faculties to the record, it reached the conclusion that fifty cents would be a fair rate. We may very well speculate upon what was in the mind of the court when it wrote the condition. We can reflect with it about the long period covered by the litigation. We can consider with it how the Gas Company had its right to begin all over again, every two or three years. We can feel with it the hardship of the continued retention of the funds impounded under the contract through the five or six

years of this controversy. We can comprehend its spirit; and we can understand how believing fifty cents to be fair, and how being asked to override the conclusions of Kentucky's due process rate-making body, it had the moral and legal right, working through the record, and concluding that fifty cents was fair, to grant to the Gas Company something of what it asked, and to exact of the Gas Company the equity that the court found to be fair. And if this court, in the face of the authorities, *supra*, finds itself at liberty to apply its own reasoning and own conclusions, for those of Kentucky's due process body, the Railroad Commission, and if it should see fit to set aside the decree, it is thought and submitted that it must be set aside, not upon any want of authority in the trial court to impose the condition exacting equity, but upon this court's original ascertainment, from its own application of its own faculties to the testimony, that the trial court erred to the detriment of the Gas Company in finding fifty cents to be a sufficient rate. And upon this thought we go back to what has been said before, *i. e.*, that when once a duly constituted hearing body has afforded due process in a rate hearing (and the bill of the Gas Company says in so many words that it had such a hearing), the courts have not the right to substitute their own views, their own conclusions, and their own deciding faculties, to the case heard by the Commission, until and unless the courts have first gone into the record and found that the hearing was not a hearing, that the decision was not a decision, and that the result came out of a meretricious disregard of the record.

X

Reverting again to our right under *Langnes vs. Green, supra,* to stand upon the decree of the trial court, but to reach the decree's results through a journey of reasoning different from that followed by the trial court: We submit that the trial court allowed an annual amortization charge of $50,000.00 without any record reason back of the item. We first pause to demonstrate, as a matter of mathematics, the effect upon the decree, if this annual charge be omitted. As heretofore demonstrated, there were sold in the Lexington district in 1926, 1,300,000 M. c. f. of gas. Fifty thousand ($50,000.00) dollars are equal, practically, to four cents per M. c. f. upon this amount of sales. Other years in the record demonstrate the sale of a lesser amount of gas; and for them the difference would approach nearly five cents per M. c. f. But taking the year 1926 alone, the elimination of this single amortization charge of $50,000.00, or four cents per M. c. f. for the gas, would reduce the trial court's ascertainment, without more, to a fair rate of forty-six cents per M. c. f. for the gas. With the mathematical effect thus visualized, we come to consider the record; and to inquire whether from it the trial court was justified in the allowance of this $50,000.00 per annum. In the outset it is to be understood that the principal and abstract thought of an amortization allowance are not to be gainsaid; but that the allowance is not to be made upon the record presented is as well not to be gainsaid. It is of the essence of an amortization charge, a charge to retire the property as paid for, that it appear from the record that the property will be useless or worn out

at the end of the given time, or that there will be some complete obstacle to the further use of the property at the running out of the period to which the amortization is applied. If there be no evidence in the record of diminishing or exhausted gas supplies, if the record does not disclose that at the end of the contract period the Gas Company may not go on and sell, or if the record does not evidence the inescapable junking of the property at the end of the period, but if the record does disclose the allowance of annual charges sufficient to keep the property in 100 per cent condition, no lack of supplies, and a place for marketing, then there is no place for an amortization charge. So let us consider the record.

The burden of showing the necessity for an amortization charge rested upon the company. It assaulted a rate fixed by state authority, a rate impressed with the presumption of fairness and adequacy. In order to overturn that presumption, and to show inadequacy in the instant case, the burden was upon the Gas Company. There is no question that there rested the burden. In Section 4(D) of the franchise contract (Record, p. 32) n. b. the company affirmatively agreed that it would assume the burden of proving that its own rates were just and reasonable.

In *Railroad Commission vs. Cumberland Telephone and Telegraph Co.*, 212 U. S. 414, s. c. 53 L. Ed. 577, a telephone rate case from Louisiana, the court said:

> "The rates, therefore, promulgated, must be regarded as *prima facie*, fair and valid, or, in other words, the onus was upon the complainant to show that they were what it asserts, confiscatory or unreasonable."

In *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1, s. c. 53 L. Ed. 371, the assault was upon a water rate ordinance of Knoxville. As appurtenant to this question of the burden, the court said:

> "If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States."

In *San Diego L. & T. Co. vs. National City*, 174 U. S. 739, s. c. 43 L. Ed. 1154, the court manifested its caution thus:

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

In *United Fuel Gas Co. vs. Railroad Commission of Kentucky*, 278 U. S. 300, s. c. 73 L. Ed. 390, there was up for decision the rate at which the United Fuel Company, that 100 per cent subsidiary of the Columbia, which is selling gas to the like subsidiary, the appellant, might sell its gas at Ashland, Kentucky. There, as here, the matter had been taken to Kentucky's public utility body, the Railroad Commission. It eventuated in a rate of thirty-two cents. The case will bear reading in its entirety for its illuminating value upon the present case

and the issues presented in it. As pertinent to the precise point here, that of the burden, the court wrote:

> "The burden of proving the value of property on which they are constitutionally entitled to earn a fair return rests upon the appellants, and, to justify judicial interference with the action of state officers in fixing the rate assailed, must be supported by clear and convincing evidence."

Possibly we trespass in adducing any authority to support so elementary a rule; and our apology for citing it lies rather in the fact that it aids us in saying more clearly what we want to say, and that is this:

The reproduction witness for the Gas Company, Mr. Kimball, gave for the appellant the only statement in the record dealing with the subject of amortization; and what he said was by way of assumption, and not of testimony. He said no word about gas supplies, their quantities nor duration. No witness for the Gas Company stated anything about the quantities of supplies, nor how they might endure through the years. What Mr. Kimball said is an interesting instance of what arithmetic and theory can do—or try to do. Let us parallel column Mr. Kimball:

He says that he makes an amortization charge of $94,688.00, and that the like sum added each year, put in government three-and-a-halfs, "at the end of the twenty-year period would add up to the amortizable value of the property, *which would at that time have no value.*" (Record, p. 223.)

Then he was asked (Record, p. 223):

"At the same time you build up this amortization fund, you make an outlay of earnings each year of $20,000 necessary to keep the property in A-1 condition?"

"And you have taken that in this instance at twenty years?"

"I have predicated these figures on an estimate of twenty years."

And he answers: "That is right."

"Is that justifiable?"

"Yes."

Now let us understand that a little. He says that he has "predicated" his figures of amortization "on an estimate of twenty years." The contract period of this particular franchise was twenty years; and Mr. Kimball seems simply to have assumed ("estimate" is his word) that when the twenty years were up, the gas supplies would be exhausted, or the plant otherwise of no value. And Mr. Kimball himself (Record, p. 226) comes to admit that he had nothing, knew nothing, upon which to rest his "estimate." We quote this excerpt from his evidence:

> "Q. Have you any information of your own as to undeveloped supplies of natural gas in Eastern Kentucky, particularly in the Big Sandy Fields?
>
> A. No, I am not familiar with the geology of that.
>
> Q. And you don't undertake to say that there are supplies of gas there that will last indefinitely? A. No, I am not prepared to say that.
>
> Q. Of course if there were such supplies there it would destroy to a large degree the amortization theory which you set out for a period of twenty years? A. Of course if I was convinced that there was an indefinite supply it would change my figures."

But Mr. Kimball further elucidates his true understanding of the matter, perhaps unintentionally. He says (Record, p. 223) that the "$20,000.00 *is to take care of the depreciation.*" But he theorizes for something

more. He would retire for income purposes the 100 per cent property as useless at the end of the franchise twenty years, some fourteen years away. We emphasize the statement that he retires the property "for income purposes." As a matter of actuality, he had not a leg to stand on. The burden was on the company to demonstrate the absence of gas, or to introduce such probative testimony as reasonably to convince the mind that at the end of this fourteen years there would in fact be no gas available. We will not labor the point to discuss it again that the company introduced no such proof. Mr. Kimball, keeping the property perfect at the expense of the company's customers, upon the simply arbitrary, and patently unsound, theory as pronounced by him, wrote in his amortization charge "on an estimate of twenty years." "Estimate," according to the lexicographers, carries the intent of assumption, and not of actuality, not of numbering and counting. It is submitted that fair reasoning minds cannot go along with this assumption of Mr. Kimball; for the idea of an exhaustion of gas supplies is not only not sustained by the record, but has no basis as within the record. Outside of the record, we may take stock, with propriety, of matters of common public notoriety and of the current happening in the every day world; and we may take stock of the fact that the Columbia Company, in the face of its direct obligation (Franchise, Section 24) "to take all reasonable means and measures to furnish an adequate supply of natural gas to the City of Lexington, and its inhabitants, at all times during the terms of this franchise," has built its own pipe lines from these very Kentucky fields to supply Washington, Baltimore, Philadel-

phia and New York, and that it as well has brought from the Pan Handle area of Texas gas into a physical connection with that network of lines reaching, among other places, back down here to Lexington, Kentucky. We may take stock of the record fact that, again in the face of this obligation to supply natural gas throughout the terms of this contract to the citizens of Lexington, the company has extended its lines to serve Georgetown and Cynthiana, additional Kentucky towns. Not only is there not any proof behind Mr. Kimball's assumption of the exhaustion of the gas, but an incontrovertible deduction from the facts in the record that the gas will not be gone. And this $50,000.00 charge, absolutely unsupported by anything save the baseless guess of Kimball, is not to tbe allowed. Literally and exactly, the company is earning this $50,000.00 every year, and it will have its plant and its gas fourteen years from now, just as it has them now; and it is a fanciful and an unfair thing to make the citizens of Lexington contribute in annual charges such sums as will pay the Gas Company once over for its properties, and yet pay in addition such annual sums as, according to Kimball himself, will keep the property in 100 per cent condition.

He "predicates these figures on an estimate of twenty years"; but we are not enlightened as to why he does. It cannot be that he thinks the property will be worn out; for he expends enough, the $20,000.00, annually to keep it in perfect condition. He cannot assume that the gas will be gone, for neither he nor any other witness upon his side has opened his mouth to say a single word about any lack of enduring supplies, either of the United Fuel Gas Company, or of that dozen or so

of companies elsewhere named herein, who under contract were supplying gas to the appellant. He can not mean that the property will be worn out physically, because (Record, p. 222) he makes this significant statement: "I can come here thirty years from now and if the company continues, it will be in that same relation; and as the property wears out it substitutes new property, so that it remains the same practically from year to year." Now let it be remembered that the opinion and decree of the court left in Lexington's part of this $20,000.00 of extraordinary expenses to keep the property in that perpetually good condition. Another witness as well for the company has something to say upon this subject. Mr. VonGemmigen, whose experiences have been of the widest, says (Record, p. 228):

> "It has been my experience in inspecting a number of gas systems * * * that there is a point when deterioration practically no longer becomes a factor, this point being the balance between replacement and maintenance as against the forces of deterioration. In other words, you can depreciate a single unit of an operating system, but the whole system does not in a practical depreciation meet a certain point, *because maintenance offsets depreciation.*"

It cannot be that Mr. Kimball's assumption for a complete amortization in twenty years rested upon any idea that the transmission lines would then be useless, as having no places, no towns or cities to serve; for it is the record here (p. 123) that this same line serves Mt. Sterling and Winchester and Versailles and Frankfort and Paris in Kentucky, and that since this litigation started, claiming a complete right of amortization in

twenty years, the company has extended these lines into the new-customer towns of Georgetown and Cynthiana. It does not show when or how, and whether, if ever, its right to supply gas to these several other communities will end. It does show that it distributes its gas in Lexington through the mains of the Lexington Utilities Company. And the court knows judicially that the Lexington Utilities Company occupies the streets of Lexington under a charter (see Printed Acts, General Assembly of Kentucky, Session of 1876, Chapter 315, page 475) granted prior to the adoption of the present Constitution of Kentucky; and as a matter of law the court knows that these old legislative charters constitute perpetual contracts between the Commonwealth of Kentucky and the grantees under them, superior to any provisions in the present Constitution. A typical Kentucky case to establish that rule is that of *Adkins, Trustee, vs. Ashland and Ironton Company,* 210 Ky. 532. A typical case from this court is that of *City of Louisville vs. Cumberland Telephone and Telegraph Company,* 224 U. S. 649, s. c. 56 L. Ed. 934. And these lines so held by the Lexington Utilities Company are employed under perpetual lease by the appellant in its gas distribution at Lexington (Record, p. 84). It is always difficult to take a record and to establish a negative; and in the instant matter we must content ourselves with the unhappy course of the direct and categorical statement that no witness for the Gas Company said one word upon any of these subjects. Again, therefore, resting upon our right under *Langnes vs. Green,* we differ with the trial court in the propriety of making this amortization allowance; for it was made upon pure assumption. If

the property, therefore, were kept up to an 100 per cent condition (and Mr. Kimball and Mr. VonGemmigen say that it was), and if there was no proof brought forward by that litigant upon which rested the burden, either of a lack of market or a lack of supplies, there is, there can be, it is submitted, no propriety in the allowing of this amortization charge. And Mr. Kimball, upon the physical side of the property, found that for the twenty years of its existence, there had been a depreciation of only 9 per cent over all (Record, p. 222). And the company in its own balance sheet (Record, p. 213) had already at the end of 1926 built up, and had a depreciation fund of $1,162,062.69, a sum some $75,000.00 greater than the company's entire rate base value of $1,586,000.00, as found by the court's opinion and decree here.

But there was proof of gas supplies. The court will find at pages 197 to 207 of the record a very full exposition of Kentucky gas supplies as made up by Mr. Beckner, a geologist connected with the Louisville Gas and Electric Company. His summary is to be found at page 205 of the record. It demonstrates a practically inexhaustible supply of gas in the Kentucky fields. He says nothing about West Virginia and other sources of supply. We have in the record, however, a visual demonstration of these sources of supply. The court will please turn to that map shown as exhibit "Hunter No. 2," sent up by special order of the trial court as an exhibit for use upon this appeal. It presents a graphic demonstration of the inter-connecting lines of the Columbia, the parent company. It demonstrates that *all of the gas that the Columbia has* is free, by pipe line connection, to go into Lexington, Kentucky. And if we

do not trespass again in referring to a judicial knowledge of the times, it may be commented how at Muncie, Indiana, this company's lines have now tied in to a great pipe line gas supply from the Pan Handle of Texas, and how, confident of its supplies, it has built its lines from these very fields, indeed from eastern Kentucky itself, to supply the cities of Washington and Philadelphia.

We may not just reach up into the air, and upon an assumption of a public utility expert, assume, or guess, or estimate that the properties of the appellant, at fourteen years from this time, will have no value; and we may not concede that the citizens of Lexington must contribute annually, over and above a fair rate for the gas, and over and above a charge annually to keep the property intact, such a sum as would pay for the properties 100 per cent at that time. Assumption is not reason; and proof must rest upon some such element of fact, fact as opposed to assumption, as that it can appeal to our reasons and command our respect. And, again, through no more desirable (upon our part) method than bare statement that a thing is not in the record, we reiterate it that it is not in the record that there should be allowed any amortization charge. And this amortization charge, unsupported in the record, if taken out of the decree, would reduce by four cents the price at which, other considerations being laid aside, the company would have to sell its gas at Lexington; and four cents off of fifty cents, the trial court's conception of a fair rate, leaves forty-six cents for the gas, which is only one cent greater than that fixed by the Commission, and which hardly justifies what we are all doing here.

And in making this point, we again stress it that the courts had not the right to go into the act of the Commission further than to determine whether it were meretricious; and that the trial court, having none the less gone into it without that ascertainment, was wholly within a just and equitable treatment of the matter when it wrote its decree upon the condition.

And as upon this amortization subject: If there were question about the right in the appellees to make the argument, to point out, and stand upon, the insufficiency of the record to support the $50,000.00 annual charge, it would seem to be answered by *Langnes vs. Green*, and *United States vs. American Ry. Express Co.*, 265 U. S. 425, *supra*. But another case addresses itself directly to the subject, *United Railway and Electric Company vs. West et al., as the Public Service Commission of Maryland*, 280 U. S. 234, s. c. 74 L. Ed. 390. The court said:

> "As the amount of depreciation to be allowed was contested throughout, is a necessary element to be determined in fixing the rate of fare and is closely related in substance to the case brought here by the company's appeal, it well may be considered in connection therewith. In these circumstances neither cross appeal nor *certiorari* is necessary to present the question."

Let it finally be borne in mind that, *in addition* to all ordinary repairs, and *in addition* to the $50,000.00 amortization charge, the court's opinion allows the company an annual charge of $15,000.00 for "extraordinary maintenance," at Lexington, $10,000.00 of it for the company's own property, and $5,000.00 of it for the Lexing-

ton Utilities property rented by it, and which it does not have to repair. The figures do not fall substantially below those of the company's expert, Mr. Kimball. Mr. Justice Lurton, in the *Knoxville Water Company* case, warned against this very duplication. He said that if repair and replacement work was "met out of the current income of that year, thereby diminishing the net income, * * * there will be a double deduction on that account, first by paying such charges as they occur, and thereafter by a contribution out of the remaining income for the same subject."

Finally: the burden rested on the Gas Company to pave the way for an amortization charge. Did it meet it?

(a) It showed nothing about the probable or possible exhaustion of gas supplies.

(b) It showed that it kept, it received an allowance for keeping, the property in 100 per cent condition.

(c) It disclosed no absence of a future market, with a consequent junking of its lines.

(d) It showed an actual depreciation of some nine per cent (Record, p. 222), less than one-half of one per centum per annum during all its past history.

And yet, upon nothing more substantial than a hypothetical assumption by Mr. Kimball of a gas exhaustion in fourteen years from this time the court adds $50,000.00 per year to the annual expenses by way of what Kimball, the witness, calls amortization. This would result that at the end of the franchise, the company would have its 100% properties, and their value once over, accumulated from its annual amortization exactions. If

there were proof in the record that the Columbia Gas organization, fourteen years from now, would be without natural gas, and if there were further proof that its mains and other supplies might not be utilized in the transportation and distribution of gas manufactured in the West Virginia and Kentucky coal fields contiguous to its lines, and if it were possible to believe that, facing such sure ending of all values in its properties the company would, to the last, still pay out its $20,000.00 per year to keep intact the perfection of its property, there might be something of justification for some amortization charge. But the Gas Company took the burden here. And in order to justify a charge based on the property's becoming useless in any given period of time, it must have put in some manner of evidence to support an exhaustion of natural gas within that time. It must prove as well the inutility of its lines for all other purposes. No single word of testimony is brought forward by it on either subject. In paying all the regular annual business and repair expenses, in paying the $15,000.00 per annum for hypothetical extraordinary repairs, the present customers are paying full measure. The property is not wearing out in their service. It is unfair to them to exact of them as well the cost of retiring a property which no witness has said must be retired. And none of us believe, if the matter might be decided upon our judgments, independent of any record proof and in the exercise of common reason and common experience, that in fourteen years from now appellant's gas will all be gone, or its property worthless for other uses.

XI

On the rate of return:

The trial court reached the conclusion and decreed that a seven per cent rate of return or earning was fair. Of that there is complaint. Perhaps, something should be said to justify the use of that rate of return. We justify it upon the following authority:

In *Willcox vs. Consolidated Gas Company* (a gas case, it will be noted), 212 U. S. 19, s. c. 53 L. Ed. 382, the Supreme Court said that a six per cent rate of return was sufficient.

In *Cedar Rapids Gas Light Company vs. Cedar Rapids*, 223 U. S. 655, s. c. 56 L. Ed. 594, the Supreme Court upheld a rate which was something in excess of six per cent.

In *Des Moines Gas Company vs. Des Moines*, 238 U. S. 153, s. c. 59 L. Ed. 1244, the Supreme Court declined to reverse the District Court upon the latter's upholding of a six per cent rate of return.

In *Georgia Railway and Power Co. vs. Railroad Commission*, 262 U. S. 625, s. c. 67 L. Ed. 1144, the court held a rate of 7¼% in a gas industry to be non-confiscatory.

In Pacific Gas and Electric Co. vs. San Francisco, 265 U. S. 403, s. c. 68 L. Ed. 1075, the court approved a 7 per cent return on properties devoted to gas service in the San Francisco district.

In *McCardle vs. Indianapolis Water Company*, 272 U. S. 400, s. c. 71 L. Ed. 316, a late full emanation from the Supreme Court upon the subject, the court upheld

the decision of the state commission in its finding of "7 per cent to be a reasonable rate of return."

There is a certain inclination to rely upon *United R. & E. Co. vs. West,* 280 U. S. 234, s. c. 74 L. Ed. 390, as demonstrative that any rate less than 7.44 per cent for a public utility would be unfair. But that such an argument is misconceived is made clear by the court's opinion in *Wabash Valley Electric Company vs. Young, etc., as the Public Service Commission of Indiana,* (January 9th, 1933) Advance Sheets, pamphlet 6, page 348. In this latter case the court made it clear that the *United R. & E.* case, with its discussion of returns of 7½ and 8 per cent, had to do with a street railway company, compelled to meet the growing competition of private automobiles, public omnibuses, and other carriers, and it set it off against this public utility concern supplying electricity in a field where it had a practical monopoly; and it commented that it might fairly be assumed that the financial structure of the Public Utility Company there, was "greatly strengthened by its affiliations and by the interested support of the parent company to which it belongs"; and it held a 7 per cent return to be non-confiscatory. If one set about searching for a monopoly in the sense that not only was there no competition, but that there could be no possible competition, one would not need to go beyond the instant case. It need not be recalled how the Central Kentucky Company here, with its somewhat restricted territory, and its somewhat restricted sources of supply, has been strengthened immeasurably by its incorporation into the Columbia's giant family. See record, page 195, where the Columbia

declares its magnitude, the five million people consuming its gas, and its "united, interconnected combination of super-fuel and super-power service." And the Central Kentucky Company, through its "three principal officers" (Record, page 207), asserted (p. 208) that the strong position of the Columbia was well known.

It would be wholly impossible to collate all of the myriad rate of return cases. Some of them reach the conclusion that 8 per cent is fair, others that 6 per cent meets the demands of justice. We submit that the Supreme Court cases cited are of highest authority; and that we may very well rest upon them. It may be noted that this court (*Bluefield W. and I. Co. vs. Public Service Commission*, 262 U. S. 679, s. c. 67 L. Ed. 1176; *United R. & E. Co. vs. West*, 280 U. S. 234, s. c. 74 L. Ed. 390, and other cases) conforms a fair rate to that generally earned at the time in the same locality in other business enterprises. In Kentucky the lawful interest rate is 6%. And he would be a wizard who, in Kentucky, could so put out his investment funds, as loans or in the engagements of business, as to earn him more than 6%. This court, in *Galveston Electric Co. vs. City of Galveston*, 258 U. S. 388, s. c. 66 L. Ed. 678, recognized, too, the tendency of the business times upon rates, thus:

> "We know judicially that the period has, in general, been one of continuous price recession, and that the current rates of return on capital are much lower than they then were."

Recognition was given to the same factor in the *Mccardle* case; and in *Lincoln Gas & E. Co. vs. Lincoln*, 250 U. S. 256, s. c. 63 L. Ed. 968, the factor of the then up-

ward trend was considered. (In passing, it may be remarked how, in this *Lincoln* case, it was considered that the "legal rate" of interest in Nebraska was 7%, and how the court thought 1% additional, an 8% of return, would be fair. Cf. the "legal rate" of 6% in Kentucky and the 7% of the decree here.)

An historic study of many of the cases, and of the attitude of many of the courts on the subject, demonstrates how wide is the variation between the judicial minds addressing themselves to this subject of return. It demonstrates as well how, in the last analysis, the end arrived at in each case is shaded by the mental processes of the particular mind which may be considering the case —"an opinion largely," as characterized by a member of the court. There is no standard, unhappily, by which the subject may be measured. There is no rule of twelve (12) inches from which we may say with certainty that a foot has been spanned. No human intelligence is so impeccably accurate as that it can divide the thread-like line between a fair and an unfair rate, and comfort itself with the reflection that the division is exactly done. Who can say that six and three-fourths (6¾%) per cent might be insufficient and that seven (7%) per cent would be sufficient? The Railroad Commission was familiar with conditions in the Commonwealth of Kentucky. Its seat was at Frankfort, the capital, some twenty-five miles from Lexington. It, of course, knew the business conditions about Lexington. The trial court was composed of three judges, two of them Kentuckians, the other living within a mile of Kentucky. They, too, must have been familiar with conditions in Kentucky and in the Ohio valley. All of them said that 7% was sufficient.

And it is to be doubted whether any of us have any better judgments. And after all, those of us who sit upon the courts of the land must give to other men and other minds the benefit of their surer knowledge, gained from closer association with the events and controversies out of which emerge their conclusions. And though it is a little bit outside the realm of legal debate, we are minded to insert here an excerpt from an essay upon the influence of the judge's individualistic point of view as influencing his opinion:

> "We are reminded by William James in a telling page of his lectures on Pragmatism, that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter. * * * Of the power of favor or prejudice in any sordid or vulgar or evil sense; I have found no trace, not even the faintest, among

> the judges I have known. But every day there is borne in on me a new conviction of the inescapable relation of the truth without us and the truth within."*

When this proceeding shall have come out of this court it will have passed through the mental processes of three different tribunals, (a) the Railroad Commission of Kentucky, (b) the three-judge District Court, and (c) this court. It should not have gone beyond the first of them, unless the second one of them, on an inspection of the record, had found that the first of them acted without evidence and without reason; and reflecting about the variant processes of the various minds which have addressed, and are addressing, themselves to the subject, would we not all do very well to accord to the conclusion of that constitutional rate-making party, that due process body, the Railroad Commission of Kentucky, the sanctity which the laws of the land throw about it? Upon what theory of right, and upon what ground of right, may other judgments and other minds determine for themselves that which the Commission itself, in the exercise of a fair reason, and upon it full hearing, had the right to decide?

But before leaving this rate of return, there is a certain other calculation which will be of service to us and may be to the court. It is to ascertain the relation between the sale price of gas in Lexington and the rate of return there—how much, to illustrate, would an increase of one cent per thousand in the selling price increase the rate of return; and how much, *per contra,* additional

*Cardozo, "The Nature of the Judicial Process." Yale University Press.

would have to be charged per thousand for the gas to increase the rate of return one per cent?

Now there was sold in Lexington in 1926 1,300,000 M. c. f. An increase of one cent per thousand would have increased the company's revenue for that year some thirteen thousand ($13,000.00) dollars. The rate base, as fixed by the trial court, is two million, two hundred thousand ($2,200,000.00) dollars, minus. One per centum (1%) of this sum is twenty-two thousand ($22,000.00) dollars. So it would take one and 7/10 (1 7/10c) cents ($22,000 divided by $13,000 equals 1.7) additional per M. c. f. for the gas to equal one per cent (1%) of return on two million, two hundred thousand ($2,200,000.00) dollars. That is, in order to increase the return to the company from seven (7%) to eight (8%) per cent, there would need to be an increase of one and 7/10 (1 7/10) cents per thousand for the gas. And stated the other way—one (1c) cent per thousand increase in the sales price of the gas would increase the company's rate of return in the proportion of thirteen-twenty-seconds (13/22) of one (1%) per cent, or fifty-nine hundredths (.59) plus, of one (1%) per cent.

There is another aspect of this subject, the rate of return, that demands some comment. There is a distinction, as well wanting in any definite measure of sufficiency, between the concept, upon the one hand, of a rate that might fall within the constitutional prohibition, a confiscatory rate, if you will, and, upon the other hand, a rate which the weighing mind might gravely question as to adequacy, and yet which that same mind would be very, very slow to declare to be unconstitutional. As

an able writer (Whitten, page 1883, of his Valuation of Public Utilities) puts it:

> "There may be considerable leeway in the realm of fair or just rates for service, a broad twilight zone where rates or charges for service are not so low as to be unjust and confiscatory nor so high as to be unjust and exorbitant."

In *Louisville & Nashville Railroad Company against Siler*, 186 Fed. 176, the Sixth Circuit, Judges Warrington, Sanford and Denison sitting, very ably portrayed this distinction. It wrote:

> "No averment is made either in terms or effect that the new rates would not yield a profit to the carrier; much less that the entire business would not do so. In the absence of a showing that property is taken, the protection of this guaranty cannot be invoked. What may be a reasonable rate or return, as a matter of legal policy, having due regard to encouraging the investment of capital in railroad enterprises is one question; but when the inquiry becomes a judicial problem, to be considered as involving the taking or not taking of the railroad's property, it is essentially a different question."

In the Supreme Court of California in *Contra Costa Water Co. vs. City of Oakland*, 159 Cal. 323, 113 Pac. 668, there was up the constitutionality of a city ordinance. The court wrote:

> "In fixing upon such percentage, however, the court is not to act upon what it, as an original question, might think to be fair and reasonable, but is rather to determine what is the lowest percentage which could properly be thought by the rate-fixing body to be fair and reasonable. On this question, there must be a certain range of discretion which may be traversed by the city council

> without infringing upon constitutional rights. If the ordinance gives a rate of return which, although low, is not palpably unreasonable, the court is not to upset the action of the council because it may think a higher rate more appropriate."

District Judge Hough, of the Southern District of Ohio, in *Columbus Gas and Fuel Company vs. City of Columbus*, 17 Fed. (2d) 630, thus distinguishes between a rate which is non-confiscatory and one which is fair:

> "There is a well marked distinction between a return non-confiscatory in character, and one which is fair in a commercial and economical sense. A rate of return may be all sufficient in fulfilling the demands of the Fourteenth Amendment of the Constitution of the United States, and at the same time fail in amount to encourage and justify the operation of a utility business under that degree of maximum efficient service to which the public is entitled. The former is a purely judicial question, while the latter is essentially legislative."

And again we bring forward the thought that the trial court may not enjoin the rate of the Commission against the presumption of its sufficiency, save upon the court's conclusion that the Commission acted without evidence, and further upon the court's clear conviction of mind of the confiscatory character of the rate. It may not enjoin because, taking the matter by and large, it might not conceive the rate to be in accord with the experiences, investments, and the opportunities of observation of this man or that man, and of this mind or of that mind. And it is submitted that though the city believes the rate to be five cents per thousand higher than a rea-

sonable rate, the record assuredly demonstrates that the 45-cent rate cannot be found to be confiscatory, cannot, as within the Constitution's prohibition, be a taking of complainant's property without due process of law. The minds of those composing the court must have a sure conviction of confiscation. A conclusion that the rates are not those that the court would fix will not permit the trial court to enjoin the Railroad Commission's order, a doctrine with which this court is in full accord. See *Willcox vs. Consolidated Gas Company*, 212 U. S. 19, s. c. 55 L. Ed. 382.

XII

In *Banton vs. Belt Line Railway Corporation*, 268 U. S. 413, s. c. 69 L. Ed. 1020, the court again tritely repeated what it has been quoted hereinbefore as saying, thus:

> "But the presumption is that the order was reasonable and valid, and the burden was on appellee (the utility concern) to establish its invalidity."

Naturally, in order to establish the invalidity of the Railroad Commission's order here, the Gas Company had to start with evidence sufficient, addressed to the sundry elements of value, to constitute proof of a rate base value. But it introduced no proof from which the court might deduce any conception of values for rate base purposes, save in such proof as it has endeavored to introduce in support of the reproduction value of its properties. In this it has signally failed to meet the rule of the Supreme Court. That court has written it with emphasis and clarity that reproduction costs under

current conditions not only may, but must be considered by the hearing body or the court in ascertaining rate base values. But it has never written that reproduction costs might be the *sole* standard, or that a public utility could prove its case *alone* by the introduction of proof of reproduction costs.

The Supreme Court has never said that reproduction cost is conclusive evidence of sole evidence of value. Let us get that idea firmly set in our minds. In the leading and much cited case of *Smyth vs. Ames,* 169 U. S. 466 (at 547), s. c. 42 L. Ed. 819 (at 849), the court said this:

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

Then again in the *Minnesota Rate* cases (*Simpson vs. Shepherd*), 230 U. S. 352, s. c. 57 L. Ed. 1511, the court said:

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts."

Again in *Georgia Railway and Power Co. vs. Railroad Com.*, 262 U. S. 625, s. c. 67 L. Ed. 1144, the court said:

> "The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost, less depreciation, was clearly correct. * * * The ascertainment of that value is not controlled by artificial rules."

In *St. Louis and O'Fallon Ry. Co. vs. United States*, 279 U. S. 461, s. c. 79 L. Ed. 798, the court said:

> "The *elements of value* recognized by the laws of the land for rate-making purposes have been pointed out many times by this court. *Among them* is the present cost of construction and reproduction." (Italics ours.)

So in this latest declaration the Supreme Court emphasized it that, while some attention must be given to reproduction costs put in in lawful evidential form, such costs were not exclusive, but were "among" the sundry factors which should be the subject of consideration. The court went on to say, to make explicit its view, that "the weight to be accorded" testimony about reproduction costs was not before it; and that in many instances *"the ultimate value * * * should be placed far below the sum necessary for reproduction."* (Italics ours.)

In *Standard Oil Co. vs. Southern Pacific Co.*, 268 U. S. 146, s. c. 69 L. Ed. 890, the Supreme Court said:

> "It is to be borne in mind that value is the thing to be found, and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide."

Lastly upon this subject of reproduction cost, we are much struck with what Whitten, in his Valuation of Public Service Corporations, V. 1, p. 616, has to say upon the subject:

> "Reproduction cost, as related to public utilities, is a concept that has little or no practical significance except as an evidence of value where conditions are such that it is difficult or impossible to establish or find market value in the economic sense. Its principal function is to serve as a handmaiden to fair value and just compensation. It follows that every assumption upon which a reproduction cost estimate is made and every method used in making it, that tends to bring a fantastic or inconsequential result and thus destroy or impair the usefulness of reproduction cost as an element in the determination of fair value or just compensation, is an assumption or a method that should be discarded. It is the result that counts. A reproduction cost estimate that obviously has no relation to fair value or that outrages the sense of justice as a measure of just compensation is a useless estimate, no matter how elaborately the unit costs may have been computed, no matter how faultlessly the logic of replacement assumption may have been carried out."

So it is submitted that the Gas Company has failed to prove its rate base value by any sufficient evidence. For it has put into the record only a single one of the many elements which must be the subject of consideration in any lawful process of valuation. And since, as within the Supreme Court's decision in the *Ashland* case (*United Fuel Gas Co. vs. Railroad Commission*, 278 U. S. 300, s. c. 73 L. Ed. 390) the Gas Company, in order to establish the unfairness of a rate, must have proved the value of its property on which it was entitled to a return,

by competent evidence of the sundry elements which the Supreme Court said must be considered, it has failed to maintain its burden; and the trial court's decree might very well have rested alone upon its failure of proof.

And again upon the doctrine of *Langnes vs. Green*, it is submitted that the trial court's decree might stand upon this additional reason, rather than upon the conditional decree of the trial court.

XIII

Again, utilizing our right to reach the trial court's result through a different process of reasoning, it is submitted that the court adopted a rate base without sufficient evidence from the appellant, and entirely too large as measured by all the evidence in the record.

There are four avenues of approach to value in the record:

(a) The reproduction method by Mr. Kimball for the Gas Company.

(b) The same method by Mr. Carter for the City of Lexington.

(c) The actual cost figures by the accountant, Mr. Jirgal, evaluated upon present day prices.

(d) The actual price paid by the Columbia for all the properties of the Central Kentucky in the autumn of 1927, the year in which the franchise contract was made.

We may briefly scan and take stock of the four methods:

(a) The value of Mr. Kimball's testimony, like that of any other witness, may be measured by the sure test of whether the witness has any knowledge of that to

which he testifies. It is fundamental that evidence of values must be adduced by witnesses who are informed of, who know, who have seen, who have experienced the things about which they testify. The evidence of a witness, for example, about the extent of the depreciation of a piece of pipe which he has never seen is not even persuasive. What some one may have told the witness about the condition of this piece of pipe is not to be given in evidence by the witness; for it would be hearsay evidence. The law forbids hearsay evidence; and the reason is that the evidence, in its primary analysis, is the evidence, not of the witness, but of the retailer of the supposed facts to the witness; and there is no opportunity to cross examine or search out the conscience and the knowledge of the retailer. The practical application here is that the Gas Company rested its claim of value purely upon a compilation put into the record by Mr. Kimball; and Mr. Kimball's testimony is a pure example of hearsay testimony. It is not, therefore, to be accepted; for the rights of men and the rights of property are not to be adjudged upon speculation, estimation, and hearsay testimony. Such, beyond question, is the character of Mr. Kimball's testimony. In an effort to avoid prolixity, we do not quote Mr. Kimball's testimony. We ask the court to turn to pages 218 to 227 of the record. They demonstrate, it is submitted, that Mr. Kimball did not know what he was talking about. He spent not exceeding two days in Kentucky; and no part of any one of them upon the Gas Company's properties. He didn't see any wells. He did not see any pipes. He did not see any compressor stations. He never got any freight rates. He never ascertained the transporta-

tion charges for material. He did not know the labor costs. And he did not know to what stations were the freight rates he applied.

We venture this assertion: had this testimony been offered in ordinary course before any informed trial court, it would have been excluded just as fast as it was offered; and we have a reflection and a feeling that no engineering testimony is to be accepted unless the engineer has applied his engineering knowledge to observe the things about which he testifies. Mr. Wigmore (Evidence, Section 657) lays down the rule with rare accuracy, thus: "What the witness represents as his knowledge must be an impression derived from the *exercise of his own senses,* not from the reports of others." The writer himself italicizes the "exercise of his own senses"; and what he means is that a witness is restricted to events or facts which he thus ascertains. The sense of sight, with its reflex effect upon the perceptive sense of values, is a *sine qua non* toward valuation; and since Mr. Kimball saw nothing, he knew nothing; and this one avenue of reproduction cost is foreclosed to us.

(b) Mr. Carter (Record, p. 229) a consulting engineer, educated at Perdue, for eleven years in the Engineering Department of the Public Service Commission of Indiana, and with large experience in the valuation of public utilities (he was the Indiana Commission's engineer in the *McCardle* case) made the appraisal for the City of Lexington. He saw and inspected himself everything about which he testified (Record, p. 231). His testimony is, therefore, competent and uncontroverted. He found that the cost of reproduction of the total physical property of the Central Kentucky Company allocable to Lexington (Record, p. 190) plus Carter's value of the

Lexington Utilities properties, including the value of the intangibles as fixed by Kimball (on the assumption that assuredly that could not be less than fair), to make a total valuation of the company's own and leased property over all, allocable to Lexington, as depreciated to present conditions, of $1,687,897.00.

(c) Mr. Jirgal went to the books of the company (Record, p. 229). His figures are definitely set forth in head VI of this paper. He has a resultant over all of values allocable to Lexington of $1,671,547.00.

(d) The Columbia bought the Central Kentucky properties in the year of the making of the franchise contract, through a stock exchange, at a price then equivalent to $2,820,000.00 (Record, pp. 208-10). Upon the same factor of allocation, 55.1%, the value of the entire properties of the Central Kentucky allocable to Lexington (Carter Exhibit 8, Record, p. 190) is $1,913,157.00.

We may take the average of these three valuations (which are no more widely different than might be expected), thus:

Carter valuation	$1,687,897.00
Jirgal valuation	1,671,547.00
Purchase price valuation	1,913,157.00
Total	$5,272,601.00

We divide by three for the average; and we get for an average over all $1,757,533.00. Then we have this calculation:

Total rate base values as fixed by the trial court	$2,198,107.00
Total rate base values as upon the three bases method	1,757,533.00
Excess of the court's valuation	$ 440,574.00

So it is submitted that the rate base of the trial court was too high by an excess at least of $440,000.00; and since 7 per cent upon that sum of $30,800.00, it is submitted respectfully that the trial court's ascertainment (Record, p. 89) of a return of $144,574.00 should be increased by this $30,800.00, giving an actual net return of $174,800.00, making, as upon the court's valuation of $2,198,107,00, a return net of 8 per cent. As figured upon the over-all three-approach total value of $1,757,514.00, it works a rate of return of substantially 10 per cent. And further: The foregoing calculations working out the 8 per cent and 10 per cent results, allow for the annual amortization charge of $50,000.00 as fixed by the trial court. If we be right in our contention that this charge may not be allowed upon assumption, and may only be allowed upon proof, proof wholly absent in the instant record, then, if we eliminate this annual charge of $50,000.00, the rate of return works out this way:

Amount of return as found by the trial court after deducting the $50,000.00	$144,574.00
Add the annual amortization charge which should not have been allowed.	50,000.00
A total return of	$194,574.00;

and this sum, $194,574.00, is an annual return of something over 11 per centum upon the average value as just deduced above from the three routes utilized by the city to an ascertainment of values. And it is 9 per centum upon the court's rate base of near $2,200,000.00.

XIV

Point VII of the Gas Company's argument here is that a 50-cent rate would not produce a 7 per cent rate of return; and certain tabular computations are put into the brief to demonstrate that if the cost of the Owsley County gas were included, the rate of return would be only some 2.6 per cent. It is another interesting application of mathematics; for while the mere additions and subtractions are right, the figures thus dealt with are not record figures, and no one may know whether they are right. In the table's own appellation they are an "Estimate—Normal Yearly Basis—1927 Deviation from Mean Monthly Temperature." There are these things about these tables:

(a) They count in *both* the Owsley County post-contract high-cost gas, and the United Fuel 100 per cent co-subsidiary high-cost gas. Let it be remembered that when the one came in, the other went out.

(b) The table is made up on what the company's expert had in his own mind about the difference between results in a warm year and a cold year. Beyond the recognized fact that there would be *some* difference, only omniscience or a rate boosting expert would undertake to say what the difference, brought down to exact dollars and cents, would be.

(c) The table works it out that the more gas there was sold the less would be the return; which would result that the only really profitable year would be one in which no gas was sold.

(d) Will the court, please, look at this in Table I?

The table shows actual sales in 1927 to be in dollars $606,912.00.

It shows *estimated* sales for that year, corrected for temperature, to be in dollars $622,784.00.

It therefore estimates that in a normal year, as compared with 1927, the revenue from sales would be increased by $15,872.00 ($622,784.00 minus $606,912.00, equals $15,872.00).

Then will the court, please, look at this, in this same Table I?

It shows the actual *cost* of gas in 1927 to be $269,703.00. Then writing in the Owsley County gas, and adapting the weather, it increases the gas cost to $360,499.00. That is what it says it is doing. Its explanatory notes on the first sheet of the table show that the first computation is "Taking No Gas from Petroleum Company," and that its other computation is "Taking Gas from Petroleum Company."

Then by the symbol (10) opposite the figures of $360,499 (weather revised cost for 1927) the compiler carries us forward to sheet 3 of this tabulation work. Let the court, please, turn to that sheet, and note that of 2,720,000 M. c. f. of gas purchased that year the tabulator only allows for 550,000 M. c. f. as purchased at 10 cents, leaving all of the excess, 2,170,000 M. c. f., to be taken in quantities from the companies of which it was buying gas *in excess of the market price* of around 10 cents, the average shown in Mr. Kimball's own table. Elsewhere herein, under heading VII of this paper, we have shown how the company had to take none of this high priced gas, save the Petroleum Exploration, and possibly some from one other company. Bearing in mind

now that the tabulation matter is one of theory, one of estimate, is it needful to do more than to enquire whether it is fair, in preparing such a table, to rest the cost, to the extent of more than three-fourths, upon high priced gas which the company did not have to buy? This is all very, very tedious; but it demonstrates rather plainly what may be done in the pyramiding of expert figures in the reaching out after income. They do not seem to us to be persuasive, when once they are understood.

XV

The Gas Company pronounces the theory, and asserts, that it has the right to charge and collect "its own rates and charges, provided only they are reasonable." Then proceeding from that false premise, it urges its right to impose, in addition to the rates at which it may sell gas, a service charge. That, it is assumed, is meant to be the same as that "monthly customer charge of 75c," named in the bill, at page 22 of the record. There is confusion in the idea of what this charge by the month is—sometimes it is called a service charge, sometimes a customer charge, and sometimes a minimum charge; but it is evident that what the appellant wants is the right to charge 75 cents a month to each customer connected to the lines, merely because of the connection and for no gas whatsoever.

The theory propounded by the appellant that it has the right to fix its own charges is untenable. In the franchise contract, out of which comes this litigation, Section 4(D), record page 32, the Gas Company agreed to

submit the ascertainment of just and reasonable rates to the Railroad Commission; and it agreed that it would "assume the burden of proving that the rates and charges promulgated by it * * * are just and reasonable." It is not worth while, in the face of the company's own agreement to leave the ascertainment of the rates to the tribunal lawfully empowered to fix them, either to respond to the argument, or to consider the authorities supposed to support it. In passing, however, it is to be reflected that not one word is said in the record about the propriety, the desirability, or the fairness of a service charge; with the result that the appellant contends for a charge as reasonable, without any of that testimony which it agreed to bring forward to prove that its charges were reasonable.

Before further considering the question of a service charge, we may search out its result:

There were in Lexington as of 1926, 13,000, plus, of gas customers. A charge of 75 cents a month to each customer would bring to the company a revenue of $9750.00 per month, equalling $117,000.00 per year; and equalling further for the eight years, at least, for which this case fixes the rates, eight times $117,000.00, or $936,000.00. The gas sales for this same year of 1926 at Lexington were 1,303,902 M. c. f.; for which amount the sum of $117,000.00 would equal 9 cents per thousand; which again means that in the innocuous looking service charge of 75 cents per meter per month, the company would find 9 cents per thousand for its gas. Seventy-five cents sounds harmless enough; but a million dollars in eight years taken from the people of Lexington, in the face of a contract which forbids any part of it, is rather un-

thinkable. That the contract does forbid it is now submitted:

Section 4(F) of the franchise contract (Record, p. 34) runs thus:

> "The rates, charges or compensation to be charged, demanded and collected by the company as herein provided shall be the total rates, charges and compensation charged, demanded and collected by the company and they shall not be increased by any other charge or device of any kind or description. The rates, charges and compensation finally fixed and determined as provided in Sub-section (D) hereof shall continue in effect until modified, altered or changed under and pursuant to the provisions of the franchise, as hereinafter provided."

With that provision fixed in our minds, it becomes very evident that a service charge is a "charge or device" prohibited to the Gas Company by its own agreement, as just quoted. Let us see if this is not sound:

In Section 4(B) of this same contract (Record, page 32) the company agreed that it would "*within two* (2) *days* after the effective date of the franchise contract promulgate in writing the rates, charges, and compensation which it may deem to be just and reasonable, and which it purposes to charge for its gas service."

The company, within this two days (Record, page 21), as recited by the bill, did file its schedule (Record, page 96). It said nothing whatsoever about a meter charge; and the first appearance of this item anywhere in the controversy was in an amended schedule, put in by the company in May of 1928. It was bound in, it is submitted, by its undertaking to manifest what rates it

wanted to cover this one fixation period by its schedule filed within two days after the contract became effective. It itself recognized that fact, because it complied with it, and because it affirmatively alleges that it did. The very spirit and atmosphere of the contract was that there should be a presentation by the company of what it wanted; and that there should be a rate fixation process starting with those rates as a basis for consideration, to cover the contract period, *i. e.*, the time of the fixation and two years beyond; and no man who reads the contract can find in it, or read into it, any right in the Gas Company to change its contentions and to increase its rates from time to time as the rate fixation proceeded. The very essence of the contract, in its provision for stated periods of rate revision, forbids any such possibility.

In pursuit of the same thought we revert again to Section 4(D) of the franchise contract, that section wherein the company agreed to take the matter to the Railroad Commission. It agreed that it would prove that "the rates and charges *promulgated by it as aforesaid,*" were just and reasonable. In the second paragraph of the contract, immediately above this undertaking (4B), those "aforesaid" rates are identified. They are those rates which were to be filed within that two-day schedule; and there was not any contention for a service charge until the second, and non-contract, schedule was presented for the first time some fifteen months later.

Then (all on page 32 of the record) the following provisions of the contract, expository of what was contracted about, are referred to:

Section 4(D), a part of the rate fixation procedure, refers to the "rates and charges promulgated and filed by the company as aforesaid."

Section 4(C), "The board hereby declares that any rate in excess of forty cents ($.40) per one thousand (1,000) cubic feet of gas would be in excess of a just and reasonable rate." Forty cents a thousand was a flat rate; and the company, on its side, then had in this same Section 4(C), the right to contend for a "higher rate than 40 cents per one thousand."

Section 4(E), the one providing for the impoundment, provides for flat rate charges of 50 cents and 60 cents per thousand feet.

Section 4(E) again, at the end of this section, has this significant provision:

> "In addition to said temporary rates hereinabove provided for, the company shall have the right to charge three cents ($.03) per one thousand (1,000) cubic feet, if the bill for services is not paid within ten days."

There is, then, the schedule, filed within the two days, that manifestation of what the company expected to contend for, that manifestation which it agreed to make within the two days. It restricts the company to a concept of compensation based upon a flat rate, whatever it may be, of so many cents per thousand cubic feet. It asked and sought no meter charge. When it came to providing for an exception as from this flat rate, it asked, and was conceded the right, to charge three cents per thousand if there were any delay in payments. That was the only exception to what the company might col-

lect under this flat rate conception, either under the terms of the contract or in the two days schedule filed by the company. And then to accentuate it, it fixed it so there could be no possibility of this meter charge, always lurking in the offing. There was written into this contract the provision that "the rates, charges, or compensation to be charged, demanded and collected by the company shall be the total rates, charges and compensation charged, demanded and collected by the company." These rates and charges were to emanate always from the company's own two days schedule. And then to leave it and to have it so that there could not be contention about it, the possibility of a service charge was excluded in the contract words that these rates "shall not be increased by any other charge or device of any kind or description." The words manifestly were not idly written into the contract. It may be surmised, indeed it may be assumed, that they were written in with the full preconception that at some time, somewhere, somehow, there would appear an effort by the Public Utilities concern to lay on some other charge or device. And in that spirit of prophecy the city tried to protect itself by contracting that when the two days schedule had been filed, and when the Commission had reached its adjudication on that schedule, and had declared its final conclusion of what the rate emanating from that schedule should be, that then that fixation should not be increased by any other charge or device of any nature or of any kind. And we are not to be too much concerned about appellant's argument to support the desirability for such a charge; for it has not the contract right to impose it; and if it

had the contract right to impose it, it has introduced no proof to support the propriety of it. And if it were permitted, in the face of its contract, to impose such charge, it should be permitted to do so only by a corresponding or co-ordinate reduction of nine cents per thousand in what otherwise would be a fair flat rate for the gas.

XVI

We may revert again (because of an unexpected, but welcomed, docketing of this cause for present hearing, this brief-work has been done by piecemeal) to the question of rates. A good deal is said by the appellant about some larger but unexplained "hazard" in the natural gas business, as a reason for higher rates of return:

Is this supposed hazard in the exhaustion of the gas? No one testifies to any near future exhaustion. And the court is asked to recall the Hunter map, and the Beckner table of an hundred years' supply.

Is the supposed hazard in any inherent danger in the commodity? If so, let it be reflected that damage claims from electricity present a greater hazard.

Is the supposed hazard in possible competition? If so, let it be reflected that if ever there was a sure monopoly, this company enjoys it here. Coal, dirty, higher-priced and inconvenient, offers no possible competition. And is there even a hint of competing gas?

A thought, an idea, however dogmatic, repeated and repeated, finally tends to become accepted as true. This idea of hazard has worked its way into some of the pub-

lic utility commission work (just as have a thousand other vagrant theories); and it is cited by appellant. We might be more persuaded if we were told, or if it were proven to us, that this sale of natural gas to Lexington is abnormally, in the rate-making sense, hazardous.

And in the face of its own quotation of authority that a rate "is, after all, a matter of opinion," the brief seriously seeks to exact an acceptance of Mr. Kimball's estimation of ten per cent as fair. And again it is to be reflected how a good many of appellant's rate authorities are those of public utility commissions in those states like Montana, Kansas, Oklahoma and Alabama where the interest rates are high. We repeat it that the Commission and the trial judges were of Kentucky and the Ohio Valley, men whose local judgments about investment matters may with confidence be relied upon.

XVII

The appellant is right in its contention that judgment for costs should not have gone against it. The trial court obviously overlooked Section 35 of the franchise contract, which provided for halving certain of the costs. The City of Lexington records itself here (a) that it claims nothing under the decree for costs; and (b) that whenever the case is concluded, it will join the Gas Company in ascertaining the costs covered by the agreement, both those already paid by either side, and those yet to be paid; and that it will equalize the matter forthwith, by paying or receiving, as need be.

XVIII

Appellant concludes its argument with the contention that the city is bound in, not alone to the court's decree, but to the reasoning processes by which the court reached the results in the decree. In the opening of this paper we answered that argument as best we could. But a new thought is injected in the appellant's concluding argument. It complains that the city has put into the record certain evidence favorable to its side; and that since all of the evidence is not in the record, the city is not to have the benefit of the testimony which it put in. Well, the rule of the court is that the appellant shall put into the record what he thinks is necessary; and that the appellee shall, after the service of appellant's schedule upon him, put into the record the evidence that he thinks pertinent. It is a fair construction of the rule (Rule 10, Subsection 2) that the appellant is expected to put into the record all that needs to go into it, and not just his side of it; and as a sort of protection against the inherent weakness of human nature, the rule goes on to provide that the appellee may put in what the appellant has omitted. So, of course, the appellant may not of its own will restrict the record and the testimony to what it would have in the record—though it is not to be gainsaid that the appellant here made a gallant and partially successful effort to that end. But it is candid enough here to tell the court the fact that it knew that the appellees purposed, under the doctrine of *Langnes vs. Green*, and the like authority, to insist upon reasons and material sustaining the decree other than those employed by the court. It says it was put upon such notice; and

the contention was argued, and brought forward, before the trial court when we were making up the record; and the wide sweep of the testimony was at the command of the Gas Company; and if it omitted any testimony which it thinks would throw light upon the issues brought forward by the appellees, it has but itself to blame. It does not mean, of course, to suggest that it introduced any testimony of its gas supplies. It does not mean that it ever once undertook in the testimony to contradict the graphic manifestation of the Columbia's own map, Hunter No. 2. As a matter of fact it introduced not a word upon the subject. Is it not somewhat novel that appellant should ask that the door be shut to the appellees because of the absence of testimony (unknown to us at least) which the appellant had the right to bring here, and on which it was put upon such notice as that, if it had any such testimony, it would, in the exercise of the simplest of prudence, assuredly have brought here? The case of *Halbert vs. United States*, 283 U. S. 753, s. c. 75 L. Ed. 1389, cited and quoted by appellant as sustaining its position, like many other authorities, does not sustain the point to which it is cited, and to which its words are quoted, when it is gone into. Here certain Indians brought suits to enforce their alleged rights to certain land allotments. There was a decree for the plaintiffs in the District Court. It was reversed in the Circuit Court of Appeals; and then came on *certiorari* to this court, which reversed the Circuit Court of Appeals, and went back to the decree of the District Court. Now let it be noted that while the Indians were the appellants in this court, the statement of the evidence was prepared by their opponent, *the counsel for the government*. The

assignment of errors challenged only the rulings of law; but when the matter came up to the Supreme Court, this same government asked a decision on matters of law which had not been in the assignment of errors, but which rested upon facts; and since the assignment of errors challenged no fact, but only rulings of law, the court very naturally declined to go into the facts—facts, let it be remembered, condensed and put into the record by the government itself, and not by mutual arrangement, and not even by the appealing party. So that case does not throw much light upon the right of the appellees here to argue upon facts in the record put in part by them, and upon issues of which the appellant had due notice, *as a subject of contention when it was making up its own record for this appeal.*

XIX

A number of here and there matters appearing in the appellant's brief require some consideration:

(a) The brief states outside the record that "the terms of the ordinance were the result of advance agreement between the city and the company." If it was a matter of negotiation, the statement in the brief that this or that was written into the franchise "for the purpose of *compelling the company*" to do this or that, is beside the mark. If either of the parties to any such contractual conferences was under compulsion, it was the city and not the company; and this for the reason that the city, relying for domestic purposes practically in entirety on this gas service, was without the power to enforce a continuance of the service, was without the power to enforce

the Gas Company to enter into a new contract. The Court of Appeals of Kentucky had settled that in *City of Ludlow vs. Union Light, Heat and Power Company*, 231 Ky. 813, and in *Union Light, Heat and Power Company vs. City of Fort Thomas*, 215 Ky. 384. As well it was settled by the three-judge District Court case (E. D. Ky.) of *Union Light, Heat and Power Company vs. The Railroad Commission of Kentucky*, 17 Fed. (2d) 143. The City of Lexington, because of the equipment in its households, and because of twenty years of construction either in new buildings or in the adaptation of old ones to the use of natural gas, was so circumstanced as that this service to it was indispensable. The Gas Company, upon the other hand, as shown by the record, and particularly by the map Hunter No. 2 (*supra*) had interconnected markets over a half dozen different states in which its gas might be sold. So if there were aught of compulsion, the power of it was with the Gas Company, and not the city. It requires no stretch of the imagination to believe that the Gas Company, having the power, made use of the power; so that the appellant's grief about any "compulsion" in bringing in the new line, and any "heavy penalty" is, to borrow a word from the appellant's brief, absurd.

(b) Here and there through the appellant's brief is interlarded, sometimes the intimation, and sometimes the charge, that the appearance in the contract of a 50-cent temporary rate, and then of a 60-cent temporary rate, is an admission by the city that the company would be entitled to those rates. It is true that those provisions appear in the contract, but it is untrue that any such deduction can be drawn from their appearance; for

the city was careful to contract against the possibility of any such inference; and this was written into the contract, Section 4(C), to be found at record page 32:

> "The board hereby declares that any rate in excess of forty cents ($.40) per one thousand (1,000) cubic feet of gas would be in excess of a just and reasonable rate for such gas service."

In the face of that declaration in the contract to which the Gas Company put its signature, it is hardly in position to argue that the city admitted, by the remotest inference, that the Gas Company would be entitled to 50 cents or 60 cents—or any other sum in excess of 40 cents. An illustrative instance of this unsupported reasoning in appellant's brief is its claim that by the interpolation of the provision for the 60-cent temporary rate, there followed the inescapable deduction that the Railroad Commission must consider the 60-cent conditions—a statement in the face of the just recited fact that the Gas Company had put its hand to a contract which conceded that the city stood upon the contention that anything, at any time, in excess of 40 cents per thousand, was unfair.

(c) It is not thought that the brief for the appellant is meant to be misleading in one of its statements about this Owsley County gas; but lest there might be a misconception about it, it is deemed wise to make clear this fact; it is stated that the minimum cost of gas under the Owsley County contract, the Petroleum Exploration contract, is $300,000.00 per annum. The statement is correct, but it should be extended to say that there is to be allocated to Lexington only 55 per cent, plus, of the total cost, equalling $165,000.00 of that sum, and that the

balance of it is apportionable to the other customers of the appellant.

(d) These statements, taken from the brief for the Gas Company here, are set up in parallel columns for contrast:

"The record shows that the parties had by common consent adopted December 31, 1926, as the convenient and logical date for determining the value of the appellant's property used and useful in rendering the service contemplated in the franchise," and also this: "All of the appraisal witnesses selected as the valuation date December 31, 1926, that date having by consent been mutually adopted because of its proximity to, and substantial identity with, the effective date of the franchise contract."

"The court then says: (2) 'The parties asked the court to determine the reasonableness of the Commission rate on the base value as of December 31, 1926.'

In view of the fact that the Commission applied its rate to *the effective date of the contract*, it would have been absurd for the parties to ask the court to determine the reasonableness of the Commission rate as of any date prior to the contract."

The argument seems to be that it would be absurd to ask the court to treat as identical the franchise contract date of January, 1927, and December 31, 1926, notwithstanding that these two dates, because of their "proximity and substantial identity," had been "by common consent mutually adopted"!

(e) The brief for the appellant inflexibly plants itself upon the conditions existing in December, 1927, when the Owsley County gas had come in; and it is equally pertinacious in ignoring the fact that the United Fuel

Gas Company and the appellant company had at that time been fused into a common entity, with the result that the high-priced United Fuel gas must go out. In homely parlance, the Gas Company would eat its cake and have it, too. The trial court declined to count out the United Fuel gas on the ground, and solely on the ground, that there had not been as of December 31, 1926, the date to which it addressed its work, a merger of the two companies. The opinion says:

> "Inasmuch as we are asked to fix the rate base and determine the income as of December 31, 1926, we are of opinion that for such purposes we should accept the contract price of gas purchased from the United Fuel as part of the cost of operation."

The trial court then differentiated, on the same basis, this case from that of *Western Distributing Company vs. Public Service Commission of Kansas,* 285 U. S. 119, s. c. 76 L. Ed. 655, where the fiction of the right to charge an arm's length pre-existing rate after the merger of the contracting parties was denounced. It is obvious, therefore, that it was in the mind of the trial court that if it should apply its faculties to the ascertainment of a fair rate to a post contract date, it would, in the searching out for that "just and reasonable" rate to which the company was entitled under the contract (and no more and no less), have disregarded the arm's length contract existing prior to the common ownership of the two companies, and would therefore have eliminated all costs of the United Fuel gas in excess of the average that was being paid for gas generally. Elsewhere in this brief it is sought to be demonstrated that the counting in of the Owsley County gas, and the count-

ing out of the United Fuel gas, leave the net income mathematically about the same. What the company is entitled to get is what is "fair and reasonable."

(f) There is criticism in the appellant's brief of the trial court's statement that to ascertain the returns as after the Owsley County gas came in would demand a redetermination of the base values of a date subsequent to December, 1926. The criticism seems to rest, in major part, upon the statement in the brief that there was no material change in the rate base values as between December 31, 1926, and December 31, 1927. But the appellant stops short of the mark; for in its assignment of errors (Record, p. 103) it complains that the trial court committed error in refusing to fix the *net income* of the plaintiff as of the *contract date*, early in 1927, *the date of the bringing in of the Owsley County gas*, December, 1927, and the *date of the rate order*, October, 1929. Appellant's thought is apparently that, finding all of its proof of values addressed to what it concedes was the agreed date of December 31, 1926, it yet could thereafter, with every opportunity for fitting its operating expenses to meet its litigious desires, require of the Commission and the court that they work out their rates as of dates for which no values whatsoever were in evidence. And we happily are supported by this frank, but perhaps contradictory, statement of the brief at another point. It said that:

> "We submit that it would not be legally possible for a court to decide the validity of a legislative rate as of one date, under one set of conditions, and thus determine the validity of such a rate as applied to a later date under a different set of conditions."

It does not seem to us that the trial court, therefore, erred in its reasoning that computations of income as of different dates would need to rest upon the rate base values of those dates.

(g) Appellant's brief makes a good deal of the fact that one of the computations of return by Mr. Carter, a witness for the city, counts in the effect of the Owsley County gas, but the brief makes no mention of the counter-balancing fact. The appellant's unitary attitude of mind seems to blind it to the fact that these same identical calculations for the city always disregarded, always denied, the gas company's right to apply and charge the intersubsidiary high-cost United Fuel gas. The city should not be estopped by the fact that its witness counted in the high-priced Owsley County gas unless it be permitted to benefit from its concomitant right to count out the high-priced United Fuel gas. The city did present to the trial court, based upon the post-contract condition, the coming in of the Owsley County gas. But these same computations of result rested upon other post-contract evidence, particularized among which may be named the autonomy of gas supplies with the consequent elimination of the high-priced, intersubsidiary gas after the Columbia's purchase of the Central Kentucky, and as well the want of necessity upon the part of the company to take gas at prices higher than the market from other producers from which it was buying. Let us be fair; and reflecting about what is fair, the question is put whether, if the December 31, 1926, status is to be disregarded as on account of the Owsley County gas of December, 1927, the gas price here may be boosted for seven or eight years upon the fiction of what the Colum-

bia, as represented by the Central Kentucky, had to pay to the Columbia, as represented by the United Fuel, during only a portion of the first of these years. There can be but one answer.

(h) Mr. Kimball is brought forward to say that upon an increase of rate there would be a decrease of consumption; and that Mr. Kimball "stands unchallenged." To that we cannot agree. Mr. Kimball is challenged:

(1.) By the record. He says that an increase in rate would decrease consumption, and he puts his oath behind it. Now in 1927, when the rate was 50 cents for all the months but December, the actual gas consumption was 1,175,954 M. c. f., or as weatherized by Mr. Kimball, 1,245,568 M. c. f.; and then he says that under the 60-cent rate the consumption would be 1,152,150 M. c. f. Let us get that—he, at the increased rate for a normal year, decreases the consumption below the actuality of Mr. Kimball's abnormally warm year of 1927. Then let us envisage these facts at page 196 of the record:

At the beginning of 1927, when the rate was 40 cents, the company had in Lexington 9143 meters, or customers.

At the end of 1928, during which entire year the rate was 60 cents, the company had in Lexington 9741 meters, or customers.

The increase in meters inside the city, after the 60-cent gas was in, was 598.

Outside the city, but in the rate area here, the meters (customers) increased in the same time from 940 to 1379, an increase of 439 (Record, p. 196).

The total increase of customers under the increased 60-cent gas rate was 598 plus 439, equalling 1037.

Mr. Kimball did not supply in the record the sales for 1928. It would have given us the facts; and it was so easy a thing to do. But he gave us theory instead; and it is submitted that the increase in customers, at the end of a full year of the 60-cent gas, of more than 1000, does challenge Mr. Kimball—challenges alike the accuracy of his figures, and the processes of his reasoning.

(2.) By everything that he put into the record; and lest it be thought that we do not challenge his work, we assert now that we challenge it because it was done near a thousand miles from the things which he had never seen, about which he literally had no sort of knowledge, about banking and financial matters of which he knew nothing, and upon theories that are all as unsound as his just discussed one of decreased consumption.

(3.) He is challenged by such a typical item as this: he would charge (Record, p. 145) annually for amortization of the *Lexington properties alone* of the company, the sum of $82,477.00. Now this annual sum, compounded at 4%, would equal at the end of twenty years, $2,554,312.69, for the same properties that the trial court found to be worth $1,586,880.00 (Record, p. 83). And he would, on top of this (Record, p. 145), amortize the Lexington Utilities properties, not owned by the Gas Company, at an annual cost of $12,191.00 to the gas consumers of Lexington.

So we do challenge Mr. Kimball. We have no sort of desire to be unpleasant; but a sense of obligation to our cause compels us to speak out what is in our hearts and minds; and that is that neither the need for money

nor the desire for money can be any sort of justification for the utilization of so-called testimony of this character, alike incompetent and unreasonable. Why again should a litigant, asking relief at the hands of the court, support his case by improbable theorizing about the effect of weather conditions, and estimated increased prices upon future sales be brought into the record, instead of the actuality of sales for the year 1928? And how does this visionary theorizing accord with the fact that the number of customers at the end of the first year of the high prices had increased over a thousand? The trial court measured rather accurately this testimony and its type, though it spoke somewhat less plainly. It said (Record, p. 83):

> "Counsel devoted considerable space in their briefs to the Menifee field. The plaintiff complains that this field had a value of $2,000,000.00 as a storage plant. We are not impressed with this claim, nor can we attach great importance to much of plaintiff's evidence as to the reproduction costs new of the main transmission line. This latter evidence in some of its aspects is purely conjectural."

This $2,000,000.00 claim theorized in by the appellant's expert, but left out of the rate base by the trial court, occasions no complaint here by the appellant; so it, too, has something of our feeling and something obviously of the court's feeling that all this material was "purely conjectural."

(i) Then the appellant seeks to uphold what Mr. Kimball tried to do about the so-called "stored gas" in the Menifee field; but Mr. Tonkin, the vice-president of the Gas Company, at the foot of page 184 of the record,

says that during a certain zero time in January, 1928, the company for five days was using all the gas it could from other sources and had to withdraw gas from the Menifee field; and from that the appellant would deduce it that the company had to bring gas from other fields and pump it back into the Menifee field for cold weather conditions; but the trouble about that is that the original supply in the Menifee field never had been exhausted, was wholly available for peakload conditions, and without any pumping in of gas into that field from other sources.

(j) Something of criticism is made in the brief for the appellant because the appellees have caused to be printed this or that which the appellant would discard as immaterial. If there were inclination to make like criticism, it might be intimated, if not charged, that the expensive tabular matter of Mr. Kimball's "estimates" are an undue burden of expense and labor. But the appellees have, in the discussion in this paper, made use of all the matter that they caused to be printed, save one or two minor matters, which the appellees as well believe to be of service toward elucidating their side. These matters are:

Mr. Carter's calculation used a value of 12½ cents per thousand in his rate of return calculation. He says that that was the result of the cost per thousand for the five years preceding December 31, 1926, excluding only the United Fuel gas (Record, p. 235); and that upon his independent investigation, at the time of his testimony, the wholesale price of gas in eastern Kentucky, as actually ascertained by him, was from ten to twelve cents. In the computations in this paper we have used 13.2

cents because that was the average of Mr. Kimball's figures, excluding only the United Fuel gas; and it will be recalled that this figure is rather above the mean of the ten to twelve cents value in the field. It was thought becoming by us to put in this testimony by Mr. Carter as well to refute the more or less unfair inference to be deduced from appellant's breaking off of Mr. Carter's testimony (Record, p. 190), that he had made the calculations in a certain way because "Judge Winn asked him to," without permitting the witness to go on and make the very reasonable explanation about why Judge Winn had asked him to make the calculations on these bases. And he says that, at the top of page 236 of the record, he made his calculations upon his investigations, rather than upon any arbitrary request by Judge Winn.

On page 236 of the record the appellees caused to be put in Mr. Carter's statements that he used Mr. Kimball's own intangible values in ascertaining his rate base.

At page 237 of the record appears an excerpt from the Mt. Sterling franchise. This was put in to manifest that the new gas from Owsley County had to be spread over communities other than, and as well as, Lexington.

Mr. Hightower was the assistant treasurer of the Columbia, the Central Kentucky, and some ten other Columbia subsidiaries, and was the chief accounting officer for the Central Kentucky Natural Gas Company. At page 237 of the record he tells that the depletion item in the company's balance sheet, *supra*, of $1,662,062.69 was a "bookkeeping entry," and did "not necessarily mean that there was actually that much depreciation in connection with the property or depletion." We may well consider in this connection what was written by Mr.

Justice Brandeis, in his dissenting opinion in *Pacific Gas & Electric Company vs. San Francisco*, 265 U. S. 403; s. c. 68 L. Ed. 1075, a point not at issue with the court's opinion in that case, that,

> "If * * * the amount set aside for depreciation proves to have been excessive, the income from the surplus reserve operates as a credit to reduce the current capital charge which the rates must earn."

Now Mr. Kimball finds an actual depreciation in twenty years of only 9 per cent, and he and the trial court allow an annual charge to keep the plant in 100 per cent condition; and Mr. VonGemmigen says that his experience is that replacements offset depreciation, so that that item is no longer a factor. Yet the balance sheet of the company, as of December 31, 1926 (Record, p. 213), shows a depreciation reserve, as of December 31, 1925, of $1,456,400.65, and (Record, p. 217) the balance sheet as of December 31, 1927 (presumably related back to 1926, as the sheet [illegible] 1926, related the item back to 1925) carries a depreciation item of $1,662,062.69. That, of course, was for the company's entire properties. The trial court (Record, p. 83) found the value of all the company's properties to be $2,880,000.00. Under the reasonable statement from Mr. Justice Brandeis, just quoted, should we deduct from the entire value of $2,880,000.00 this item of depreciation of $1,662,062.69, we would have a capital base of $1,217,934.31, over all, equalling for Lexington (55%) $669,865.00. The result would be that, instead of the trial court's value of the company's properties allocable to Lexington of $1,586,888.00 (Record, p. 83) we should substitute $669,865.00; with a resultant deduction of $917,023.00, on which no return

should be allowed. While it is not thought that the court will follow these literal figures, it is thought that this relatively enormous and unnecessary depreciation fund, already built up by the company, is one of those "relevant facts" which the court must "regard" (*Bluefield Water* case, *supra*) in considering the adequacy of the net earnings to produce a fair return.

This court, in *Smith vs. Illinois Bell Telephone Co.*, 282 U. S. 133, 158, s. c. 75 L. Ed. 255, 268, has sanctioned the propriety of considering such accumulated reserves in rate-making. It wrote:

> "The recognition of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if experience shows that these are excessive."

In view of what has been manifested from the record, does not this company's experience in accumulating this reserve of $1,662,062.69, larger by $75,000.00, plus, than Lexington's allocable value ($1,586,068) of the total properties, portray a state of fact which "does not make it necessary to allow similar accumulations to go on"? And in view of them is the trial court's amortization charge of $50,000.00 justifiable?

XX

We desire to conclude this discussion with the best statement that we have been enabled to find portraying the rights of courts to interfere with rates established by local hearing authority. The court will please turn to the Eighth Circuit case of *Louisville & Nashville Rail-*

road Company vs. Railroad Commission of Alabama, 208 Fed. 35. It was before Judges Pardee, Shelby and Grubb. They wrote this:

"In deciding the question whether or not an order made by authority of the state, fixing rates, is confiscatory, the inferior courts, as to the measure of proof, are guided by well settled rules, binding on them because announced by the Supreme Court. One of those rules is that the rate fixed by legislative authority is *prima facie* fair and just. The rate having been fixed by a commission vested with legal authority, the presumption must be indulged at the outset that it is reasonable and not violative of constitutional rights. The burden of proof is placed on the plaintiff to show that the case is one calling for judicial interference with the authorized action of local authorities. *Louisiana R. R. Commission vs. Cumberland Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577; *Minneapolis & St. Louis R. R. Co. vs. Minnesota*, 186 U. S. 257, 264, 22 Sup. Ct. 900, 46 L. Ed. 1151. Another rule for our guidance is that the burden of proof is not only placed on the plaintiff but that the plaintiff is required to do more than offer a mere preponderance of evidence. The judiciary is not permitted to interfere with the rates established by legislative authority unless it is made to appear clearly and beyond reasonable doubt that they are unreasonable and that their enforcement would be equivalent to the taking of property for public use without just compensation. If the evidence offered leaves the court in doubt, if it is not clear, satisfactory, and convincing, the rate fixed by state authority should not be enjoined. *San Diego Land Co. vs. National City*, 174 U. S. 739, 754, 19 Sup. Ct. 804, 43 L. Ed. 1154; *St. L. & San Francisco Ry. Co. vs. Gill*, 156 U. S. 649, 666, 667, 15 Sup. Ct. 484, 39 L. Ed. 567. So stringent are these rules against the interference with the action of

> the local authorities in fixing rates that it has been said that the court should not enjoin a rate unless it can hold 'that it was impossible for a fair-minded board to come to the result which was reached.' *Knoxville vs. Water Co.*, 212 U. S. 1, 17, 29 Sup. Ct. 148, 153 (53 L. Ed. 371).
>
> These rules are not mere cautionary phrases. They are intended to mark the limits of judicial interference. If the inferior courts will regard these principles, not as platitudes, but as rules prescribed for their guidance, it will greatly lessen legislation and litigation in relation to the regulation of the tariffs of public service corporations."

Next we bring attention to the company's proof, the statistical matter prepared by Mr. Kimball, at the following pages in the record. Table 134 is an "estimate." The one at page 135 is an estimate. The one at page 136a is an estimate. The one at page 138a is an estimate, in that it assumes what the gas consumption would be if the temperature were otherwise. The one at page 138b is an estimate. The one at page 139 is an estimate. The one at page 140 is an estimate. The one at page 141 is an estimate, so those at 142 and 143 and 144. The one at page 153 brings out its percentage results on Kimball's estimated cost of reproduction. The remaining of his tables are his theoretical "reconciliations" of what the company's actual figures are to what he conceives they ought to be. His table at page 172 is remarkable indeed in that it emphasizes the point hereinbefore made, how he would have the consumption and profits both decrease at the high rate, when as a matter of fact the number of consumers increased over a thousand in the two years disclosed to us in which there were higher

rates. Is it beside the mark, in view of these invasions of the wide field of supposition, to say what this court said in the *Minnesota Rate* case, in these words;

> "The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

CONCLUSION

In a rate case there is no orderly sequence of events such as underlie the ordinary litigation. There are no opening event, no series of facts that may be related by witnesses, no breaking off at the end, and no beginning of a law suit. The preparation of a brief, therefore, is not a particularly happy work; and when it is completed it leaves, with the compiler of this one at least, a sense of rather rough accomplishment. In addition it has had to be prepared under a brevity of time, due to the wholly unexpected early assignment of the case. We submit the controversy to the court, emphasizing again the insistence that the trial court had not the right to take the case from the due process body, the Railroad Commission of Kentucky, for any other purpose than to ascertain whether the rate emanating from that body came without any testimony and without any reasons behind it. But if this court should believe that the trial court was within its proper province in doing what it did, then we submit that the trial court's decree, the leaving in effect the 45-cent rate of the Railroad Commission, was

justified alike upon the trial court's treatment of the matter and for those reasons herein suggested, other than those employed by the trial court.

Very respectfully,

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